92-338

Supreme Court, U.S.
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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

COOPER TIRE & RUBBER COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL T. McMENAMIN, *Counsel of Record*
for Petitioner Cooper Tire & Rubber
Company; and
NANCY A. NOALL
Walter, Haverfield, Buescher
& Chockley
1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212

August 21, 1992

QUESTIONS FOR REVIEW

Cooper Tire & Rubber Company ("Cooper") petitioned the U.S. Court of Appeals for the Fifth Circuit for review of an order of the National Labor Relations Board (the "Board" or "NLRB"), finding that Cooper had violated the National Labor Relations Act by, *inter alia*, promulgating and enforcing an overly broad no-solicitation rule and by suspending, then discharging, employee Mitzi Rye for engaging in union solicitation in work areas at times when either she, or the employee whom she solicited, should have been working. The Board cross-petitioned for enforcement of its Order. On review, the Fifth Circuit upheld the Board's decision, finding the rule overly broad, but refused to enforce that part of the NLRB's Order requiring Cooper to rescind its no-solicitation rule in its entirety and held that Cooper was entitled to enforce its no-solicitation rule when either the solicitor or the solicitee should be working. The Fifth Circuit granted enforcement, however, to that part of the Board's Order that required Cooper to reinstate employee Mitzi Rye with back pay.

1. WHETHER AN EMPLOYEE WHO ENGAGES IN UNION SOLICITATION AT A TIME WHEN EITHER THE SOLICITOR OR THE SOLICITEE SHOULD BE WORKING IS ENGAGED IN ACTIVITY THAT IS UNPROTECTED BY THE NATIONAL LABOR RELATIONS ACT; AND

2. WHETHER THE BOARD'S *DAYLIN* DOCTRINE, FIRST ANNOUNCED IN *DAYLIN, INC.*, 198

NLRB 281 (1972), ENFORCED ON OTHER GROUNDS, 496 F.2D 484 (6TH CIR. 1973), RELIED UPON BY THE NLRB IN ITS DECISION IN THIS CASE AND IMPLICITLY ADOPTED BY THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT IN ITS DECISION IN THIS CASE, IMPERMISSIBLY EXTENDS THE PROTECTION OF THE NATIONAL LABOR RELATIONS ACT TO EMPLOYEES WHO ARE ENGAGED IN UNPROTECTED ACTIVITY, I.E., SOLICITING FOR A UNION AT TIMES WHEN THE SOLICITOR OR THE SOLICITEE SHOULD BE WORKING; AND

3. WHETHER THE NATIONAL LABOR RELATIONS BOARD HAD THE AUTHORITY TO ORDER COOPER TIRE & RUBBER COMPANY TO REINSTATE EMPLOYEE MITZI RYE WITH BACK PAY WHEN SHE WAS DISCHARGED FOR ENGAGING IN UNPROTECTED ACTIVITY, I.E., SOLICITING FOR A UNION AT TIMES WHEN EITHER SHE OR THE EMPLOYEE SOLICITED SHOULD HAVE BEEN WORKING.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

COOPER TIRE & RUBBER COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner Cooper Tire & Rubber Company ("Cooper")[1] respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which is reported at 957 F.2d 1245 (5th Cir. 1992) and reprinted in the

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[1] Cooper Tire & Rubber Company is a publicly-held corporation with its headquarters located in Findlay, Ohio. Cooper owns and operates a plant in Tupelo, Mississippi, within the jurisdictional boundaries of the Fifth Circuit. Pursuant to Rules 14.1(b) and 29.1 of this Court's rules, Cooper states that there is no parent or subsidiary company of Cooper to be listed in this petition.

Appendix at Pages A(1)-(27). The Decision and Order of the National Labor Relations Board which was reviewed and enforced as modified by the Fifth Circuit is reported at 299 NLRB No. 145 (1990) and is reprinted in the Appendix at Pages A(43)-(110). Due to its length the Appendix has been submitted as a separate volume.

JURISDICTION

On April 8, 1992, the Fifth Circuit rendered its opinion, which is the subject of the instant petition for review. *See* App. pp. A(1) - (27). Judgment was entered by the Fifth Circuit and an order issued adopting the Board's judgment entry on June 1, 1992. *See* App. pp. A(28) - (40). Cooper filed a timely petition for rehearing as well as a suggestion for rehearing *en banc*. Both were denied by Order entered on July 8, 1992. *See* App. pp. A(41) - (42).

The Fifth Circuit had jurisdiction to review the Board's Order pursuant to 29 U.S.C. §§160(e) and (f). This Court has jurisdiction to review the Fifth Circuit judgment in question by writ of certiorari pursuant to 29 U.S.C. §§160(e) and (f) and 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this case are cited below and reproduced verbatim in the Appendix at A(111) - (117) due to their length, pursuant to Rule 14.1(f) of this Court's rules.

1. *29 U.S.C. §157.* [Section 7 of the National Labor Relations Act]

2. *29 U.S.C. §158(a)(1).* [Section 8(a)(1) of the National Labor Relations Act]

3. *29 U.S.C. §158(a)(3).* [Section 8(a)(3) of the National Labor Relations Act]

4. *29 U.S.C. §160(a).* [Section 10(a) of the National Labor Relations Act]

5. *29 U.S.C. §160(c).* [Section 10(c) of the National Labor Relations Act]

6. *29 U.S.C. §160(e).* [Section 10(e) of the National Labor Relations Act]

7. *29 U.S.C. §160(f).* [Section 10(f) of the National Labor Relations Act]

STATEMENT OF THE CASE

The Regional Director for Region 26 of the National Labor Relations Board issued a series of complaints against Cooper Tire & Rubber Company ("Cooper") at its Tupelo, Mississippi plant based upon charges filed by the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO (the "Union" or the

"URW").[2] A hearing was held before an Administrative Law Judge (the "ALJ") and, on August 31, 1989, the ALJ issued his recommended Decision and Order dismissing certain of the allegations but finding that Cooper had violated the National Labor Relations Act, 29 U.S.C. §§158(a)(1) and (a)(3) (the "Act") in other areas. Cooper filed exceptions to the ALJ's Decision. On September 27, 1990, the Board issued its Decision affirming the ALJ's rulings and findings, with minor exceptions that did not affect the validity of the ALJ's Decision.

The Board found that Cooper had violated §§8(a)(1) and 8(a)(3) of the National Labor Relations Act by unlawfully (1) maintaining and enforcing an invalid no-solicitation rule and (2) suspending and then discharging Mitzi Rye for engaging in union solicitation in violation of the no-solicitation rule because *inter alia*, the rule was invalid. The Board had ordered Cooper to rescind its no-solicitation policy in its entirety. The no-solicitation policy at issue provided:

> No Cooper employee should be permitted to distribute any printed matter or solicit on behalf of any group or organization during *working time* or in any *working area*. (Emphasis added by the Fifth Circuit.)

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[2] Although the URW filed the underlying unfair labor practice charges in this case, the URW did not intervene in the review proceedings before the Fifth Circuit. Accordingly, pursuant to Rule 14.1(b) of the Rules of the Supreme Court, the sole parties to the proceedings are those whose names appear in the caption of the case.

> Solicitation or distribution of printed matter by Cooper employees will be permitted only during non-working time and in non-working areas.

Cooper timely filed a petition for review of the decision of the Board with the U.S. Court of Appeals for the Fifth Circuit, pursuant to 29 U.S.C. §160(f). The NLRB filed a cross-application for enforcement pursuant to 29 U.S.C. §160(e). On April 8, 1992, the Court issued its opinion, reversing the Board on certain issues but enforcing the Board's order as modified. The Court entered an order adopting the Board's proposed judgment entry on June 1, 1992. Cooper timely filed a petition for rehearing, which was denied on July 8, 1992.

The only part of the Fifth Circuit's decision, which is the subject of the instant petition for writ of certiorari, is that part of the Court's decision which found, in agreement with the National Labor Relations Board, that Cooper unlawfully suspended, then discharged, employee Mitzi Rye for engaging in union solicitation in work areas at time when either she or the employee solicited should have been working.

In considering the validity of Cooper's no-solicitation rule, the Fifth Circuit agreed with the Board that part of the rule was invalid, finding evidence that the policy prohibited union solicitation in certain break areas while employees were on break. [App. p. A(9)].[3] The Fifth Circuit, however, modified the Board's Order

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[3] Mitzi Rye was *not* disciplined for violating this aspect of the rule.

to the extent that it had required absolute rescission of the no-solicitation rule. [App. pp. A(2) and (13)]. The Fifth Circuit modified the Order to allow employees, during their non-work time, to solicit in all break areas, specifically including the smoking area, restrooms, areas surrounding the water fountains, and the pathway to the main break room. [App. pp. A(2) and (13)]. In modifying the Board's Order, however, the Fifth Circuit specifically stated that:

> This opinion should not be construed so as to order Cooper to permit solicitation in actual working areas, i.e., in the immediate areas surrounding continuously operating machines. Further, we make clear that all employees involved in the solicitation are permitted to solicit in break areas only during their break times, whether informal or scheduled. *That is, both the solicitor and the solicitee must be on break.* (Emphasis added)

See App. pp. A(2, fn. 2)

Despite its ruling concerning the no-solicitation rule, however, the Fifth Circuit's decision with respect to Cooper's discharge of Mitzi Rye for violating the no-solicitation rule effectively prevents Cooper from enforcing the valid aspects of the no-solicitation rule. Specifically, Cooper had presented evidence (ignored without explanation by the Board, but acknowledged by the Fifth Circuit), that Rye had engaged in solicitation of fellow employees in work areas at times when either

she or the employee solicited should have been working. [App. pp. A(19) - (20)].

The Fifth Circuit nonetheless agreed with the Board's finding that Cooper could not lawfully discharge Rye for engaging in the very activity that the Fifth Circuit had specifically said Cooper could lawfully prohibit, stating:

> We agree with the Board that these conversations were only of a few second's duration and there was no evidence that any conversation resulted in or had the potential for disruption.

[App. p. A(20)].

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Board's *Daylin* Doctrine Impermissibly Extends The Act's Protection To Unprotected Activities

Forty-seven years ago, this Court stated, "Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours". *See Republic Aviation Corp. v. NLRB*, 324 U.S. 792, 89 L.Ed. 1372, 1379-80, f.n. 10 (1945). Two years before that, the National Labor Relations Board itself recognized this fundamental premise that "work time is for work" and that an employer is therefore entitled to expect employ-

ees to work when they are on work time. *See Peyton Packing Co.*, 49 NLRB 828, 843-44 (1943), *enf'd*, 142 F.2d 1009 (5th Cir. 1944), *cert. denied*, 323 U.S. 730 (1944).

Nevertheless, 27 years after the Supreme Court's decision in *Republic Aviation* and 29 years after its own decision in *Peyton Packing*, the NLRB departed from the fundamental doctrine that "working time is for work" and held that an employer may not lawfully discipline an employee who engages in the unprotected activity of engaging in union solicitation at a time when he or the employee solicited should be working, if the employer maintains an overly broad work rule that, on its face, could apply to protected activity. *See Daylin, Inc.*, 198 NLRB 281 (1972), *enf'd* on other grounds, 496 F.2d 484 (6th Cir. 1974). In *Daylin*, the Board ruled that if an employee is discharged for soliciting in violation of an unlawfully broad no-solicitation rule, the discharge also is unlawful unless the employer can affirmatively establish that the solicitation interfered with the employee's own work or that of other employees and that this, rather than violation of the rule, was the reason for discharge. The *Daylin* doctrine is applied by the Board even if the employee is not discharged for violating the over-broad or illegal aspects of the rule.

Indeed, this is exactly what the Board did in the case of Mitzi Rye, holding that even if she had engaged in work time solicitation, there was no showing by Cooper of impairment of production. *See* App. pp. A(88, fn. 33) and (A)89. Similarly, the Fifth Circuit adopted the *Daylin* reasoning, *sub silentio*, when, in determining whether to enforce the Board's order, it

stated, in discussing Rye's conversations with employees about the union on work time and in work areas, "these conversations were only of a few seconds' duration and there was no evidence that any conversation resulted in, or had the potential for, disruption". *See* App. p. A(20).

The *Daylin* doctrine which extends the protection of the National Labor Relations Act to employees who engage in union solicitation when he or she should be working has been Board law for 20 years. Cooper submits that the validity of the Board's *Daylin* doctrine raises a question of exceptional importance that has not, but should be, settled by this Court. This Court has never ruled on its validity, and the U.S. Courts of Appeals asked to rule on its validity have declined to do so.

Indeed, the U.S. Court of Appeals for the Sixth Circuit, in reviewing the Board's decision in *Daylin* itself, while declining to rule on the validity of the *Daylin* doctrine, observed in a footnote that it had serious concerns about the validity of the doctrine. *See NLRB v. Daylin Inc.*, 496 F.2d 484 at 489, fn. 3. ("This [the Daylin doctrine] of course, would have the effect of shifting the burden of proof as to the challenged discharge from the general counsel to the respondent. To assess the validity of the Board's theory, it will be necessary to decide the question of whether a no-solicitation rule that is over-broad on its face may,

nevertheless, be validly enforced against persons *engaging in unprotected activity*".)[4] (Emphasis added.)

Further, two of the five members of the Board who rendered the *Daylin* decision 20 years ago dissented from that part of the decision which has come to be known as the *Daylin* doctrine. As Member Kennedy stated, "The Board has long recognized that it is not improper for an employer to insist that 'working time is for work . . . employees are not engaged in protected activity when they neglect their work duties to engage in union solicitation'". 198 NLRB at 282. Similarly, Chairman Miller expressed fears that an order which required an employer to reinstate an employee for utilizing work time for engaging in unprotected activity, whatever its nature, violates Section 10(c) of the Act [29 U.S.C. §160(c)] which prohibits the Board from ordering reinstatement of any individuals who are "suspended or discharged for cause".[5]

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[4] The Sixth Circuit enforced the Board's Order in *Daylin* on the basis that the employer condoned other solicitations on work time and enforced the rule only against union solicitation. In this regard, it is critical to note that the ALJ and the Board found that Cooper had uniformly enforced its no-solicitation rule against all solicitation, union and non-union alike, and regardless of whether the solicitation had a disruptive effect on work. [*See* App. pp. A(66) - (67) and A(69) - (70)].

[5] Certain Courts of Appeal have cited with approval other aspects of the Board's decision in *Daylin*. *See, e.g., Restaurant Corp. of America v. NLRB*, 827 F.2d 795, 805 (DC Cir. 1987). With the exception of the instant case, Cooper's research has not revealed a single case where any U.S. Court of Appeals has either expressly or impliedly agreed with the Board that simply because an employer maintains an over-broad no-solicitation

Like the Sixth Circuit, the Fifth Circuit had in the past expressly declined to rule on the validity of the Board's *Daylin* doctrine. *See Custom Recovery Division of Keystone v. NLRB*, 597 F.2d 1041 at 1044, in which the court stated, "We need not and do not rule on the propriety of the *Daylin* doctrine, however", finding instead that the Company's no-solicitation rule was valid and therefore that the "Board's application of the *Daylin* doctrine in this case was unwarranted, and its finding of a §8(a)(1) violation is not supported by substantial evidence". 597 F.2d at 1045. Moreover, even though it was asked to rule on the validity of the *Daylin* doctrine in the instant case, the Fifth Circuit did not do so, but it adopted the doctrine *sub silentio* when it required Cooper to reinstate Mitzi Rye, even though it acknowledged that she had engaged in solicitation at times when she or others should have been working.

Cooper submits that the very reason this Court has said that employers are permitted to ban solicitation on work time is that employees who are engaged in union solicitation while they should be working are simply not engaged in activity protected by the National Labor Relations Act. Cooper submits that the Board's *Daylin* doctrine goes too far. It should be overturned as an impermissible infringement upon a company's right to operate its business. The validity of the *Daylin* doctrine should finally be squarely addressed by this Court in order to provide some certainty to employers as to whether they may lawfully discharge employees for

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rule, it is thereby prohibited from enforcing the rule against work-time solicitation which it could otherwise lawfully prohibit.

violating the legal aspects of an otherwise over-broad no-solicitation rule.

B. The Board Has No Authority To Order An Employer To Reinstate An Employee Who Was Discharged For Engaging In Work-Time Solicitation.

The Fifth Circuit, in its decision in the instant case, recognized the fundamental principle announced by this Court in *Republic Aviation* that "working time" is for work when it modified the Board's order concerning Cooper's no-solicitation rule to make it clear that employees are permitted to solicit only in break areas and only during their break times -- "That is, both the solicitor and the solicitee must be on break". [App. pp. A(2, fn. 2) and A(6)]. Yet the effect of the Fifth Circuit's decision enforcing the Board's order regarding Mitzi Rye is to say, on the one hand, that Cooper can lawfully promulgate a rule prohibiting employees from soliciting in work areas or on work time, and, on the other hand, that Cooper may not enforce the rule when the solicitation "neither resulted in, or had the potential for, disruption".

Employers violate Sections 8(a)(1) and (a)(3) of the National Labor Relations Act by discharging an employee only if they discharge the employee for engaging in activity protected by Section 7 of the Act. [*See* 29 U.S.C. §§158(a)(1) and (3); 29 U.S.C. §157]. Under Section 10(a) of the Act [29 U.S.C. §160(a)], the Board only has the authority to investigate and remedy violations of the

National Labor Relations Act. As previously pointed out, employers are permitted to ban solicitation on work time because employees who are engaged in solicitation while they should be working are simply not engaged in activity protected by Section 7 of the National Labor Relations Act (29 U.S.C. §157). Hence, a Board order that requires an employer to reinstate with back pay an employee who is engaged in unprotected activity exceeds the Board's authority under Section 10(a). Such an order further runs afoul of §10(c) of the Act [29 U.S.C. §160(c)] which expressly prohibits the Board from ordering the reinstatement of any individuals who are "suspended or discharged for cause."

Cooper submits that the question of whether an employee is engaged in unprotected activity by soliciting when he or she should be working is a question of exceptional importance in the area of federal labor law. It is a question that has not, but should be, addressed by this Court. To simultaneously hold, as the Fifth Circuit has done, that an employer may lawfully promulgate a rule prohibiting work-time solicitation, but that the employer may not enforce its rule against work-time solicitation under certain circumstances, places employers in an untenable position. If "work time is for work", then an employee who is soliciting when he or she should be working is not engaged in activity protected by the Act. Hence, an employer should be free to assess what it considers to be the appropriate quantum of discipline for an employee who engaged in work-time solicitation without scrutiny by the National Labor Relations Board which has statutory authority to

prohibit discrimination only if the discrimination is based upon activity protected by the Act.

CONCLUSION

Cooper submits that Member Kennedy and Chairman Miller and the Sixth Circuit were right when they questioned the validity of the *Daylin* doctrine. An employee like Mitzi Rye who solicits for a union when she or the employee solicited should be working is simply not engaged in protected activity. Accordingly, the quantum of discipline the employer chooses to impose on such an employee is not subject to review by the National Labor Relations Board.

Based on the foregoing, Cooper urges the Supreme Court to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit in the underlying matter.

Respectfully submitted,

Michael T. McMenamin, *Counsel of Record*
for Petitioner Cooper Tire & Rubber Company; and
NANCY A. NOALL
WALTER, HAVERFIELD, BUESCHER & CHOCKLEY
1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212
Attorneys for Petitioner

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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for Petitioner Cooper Tire & Rubber
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NANCY A. NOALL
Walter, Haverfield, Buescher
& Chockley
1215 Terminal Tower
Cleveland, Ohio 44113
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APPENDIX

OPINION OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

COOPER TIRE & RUBBER COMPANY,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS
BOARD, Respondent, Cross-Petitioner.
No. 90-4892.

United States Court of Appeals,
Fifth Circuit.

April 8, 1992.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board.

Before BROWN, DAVIS and BARKSDALE, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

The National Labor Relations Board seeks enforcement of its order, which found that Cooper Tire & Rubber Company (Cooper) violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the Act). Specifically, the Board found that Cooper unlawfully (1) maintained and enforced an invalid no-solicitation rule; (2) discharged Mitzi Rye and suspended Rocky Pickering for their union solicitation; and (3) interrogated employees about Mitzi Rye's union activities. We modify and enforce the Board's order.

Introduction

[1] After listening to numerous witnesses at a hearing held on November 14-17, 1988 and January 17-19, 1989, an ALJ found that Cooper violated sections 8(a)(1) and 8(a)(3) of the Act. The Board affirmed the ALJ's findings and adopted the ALJ's order after making minor modifications.[1]

Our review of the Board's decision is limited to a determination of whether the Board's findings are supported by substantial evidence on the record as a whole. *Central Freight Lines, Inc. v. N.L.R.B.*, 653 F.2d 1023 (5th Cir. Unit A 1981). Our examination of the record convinces us that the requisite evidentiary basis for the Board's order was present with two exceptions. First, insofar as the Board's order requires absolute rescission of Cooper's no-solicitation rule, we deny enforcement. We modify the order to allow employees during their non-work time to solicit in all break areas, specifically including the smoking area, restrooms, areas surrounding the water fountains and the pathway to the main break room.[2] Second, we hold that the record

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[1] The Board found fault with the ALJ's failure to provide a full expunction remedy in his recommended Order. Thus, the Board modified the order to require Cooper to remove from its records any reference to Rye's discharge and Pickering's suspension; notify both Rye and Pickering that this had been accomplished; and refrain from using the discharge and suspension as a basis for future personnel actions against them.

[2] This opinion should not be construed so as to order Cooper to permit solicitation in actual working areas, i.e., in the immediate areas surrounding continuously operating machines. Further, we make clear that all employees involved in the solicitation are permitted to solicit in break areas only during their break times, whether informal or scheduled. That is, both the solicitor and the solicitee must be on break.

lacks substantial evidence to support the Board's finding of unlawful interrogation.

All About Cooper

Cooper opened a plant in Tupelo, Mississippi in 1984 where it manufactures steel-belted radials. The Tupelo plant has about 685 employees and measures over 1,000,000 square feet. Unlike its other plants,[3] Cooper's Tupelo plant is a continuous operation, producing tires seven days a week, 24 hours per day. All of Cooper's plants are unionized except for its Tupelo plant.

Cooper staggers the starting and ending times of the various shifts so that the machines can continuously run.[4] During their shifts, Cooper employees at Tupelo get a scheduled 20-minute paid lunch break. Except for the tire assembly department where approximately 30 employees take their lunch breaks together, employees' lunch breaks are staggered so that not everyone in the same department eats lunch at the same time. Employees are also permitted shorter informal smoking breaks and breaks to use the restroom and get a drink of water at the water fountains as needed.

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[3] Cooper has its corporate headquarters and a tire plant in Findlay, Ohio, a tire plant in Texarkana, Arkansas; inner tube plants in Mississippi and Mexico; and industrial products plants in Arkansas, Indiana and Ohio.

[4] Employees are assigned to four groups. Each group is required to work seven consecutive days in each shift: 7 a.m. to 3 p.m. (day shift); 3 p.m. until 11 p.m. (afternoon shift); and 11 p.m. to 7 a.m. (night shift). Employees receive two days off between the 7-day morning and 7-day afternoon rotations. After the 7-day night rotation, each employee receives three days off from work. Thus, in a four-week period, each employee works 21 days and is off from work 7 days.

Tire builders generally arrive at work 10 or 15 minutes before the start of their shift to prepare their machines. This causes the outgoing operators to suspend production even though they are still clocked in. Employees in this department have access to a lunch room, several locker rooms, restrooms, a smoking area and several water fountains.

Layout of the Plant

Because a description of the plant's physical boundaries is necessary to fully understand this case, we include the following detailed explanation of the plant's various areas moving from the east to west side of the plant.

The main area of the plant measures 430 feet along the north side and 520 feet deep. A large employee parking lot is on the plant's east side providing employees access to the plant. Two locker rooms are located just inside the main entrance and are 45 feet by 150 feet and 45 by 135 feet. The main production area is just west of the locker rooms.

In the large production room, the first area is the curing and finishing area, measuring 240 by 500 feet in size. Over 100 machines are used in the curing process. The next production areas are the first and second stage tire building facilities which together measure 360 by 300 feet. The Tupelo plant has 35 first stage and 13 second stage tire building machines in this area. To the south and west of the tire building area are the mixing areas, measuring about 90 by 420 feet and 135 by 540 feet.

The administrative offices, break room (about 20 by 70 feet), restrooms, the kit locker room and the smoking area are along the north wall of the plant. There is a water fountain in the smoking area and several other fountains are scattered throughout the plant.

(1) Validity of the Rule

Cooper's no-solicitation policy prohibits all kinds of solicitation during work time and in work areas. Specifically, Cooper's employee handbook provides:

> No Cooper employee should be permitted to distribute any printed matter or solicit on behalf of any group or organization during *working time* or in any *working area*. (Emphasis added.)
>
> Solicitations or distributions of printed matter by Cooper employees will be permitted only during non-working time and in non-working areas.

With the exception of the break room and locker rooms, Cooper treats the entire plant as a working area.[5]

Because the Board found that Cooper's no-solicitation rule prohibits solicitations during non-work periods in areas which had not been shown to be working areas, it concluded that the rule was invalid in violation of section 8(a)(1) of the Act. Specifically, the Board stated:

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[5] There is controversy over whether the kit locker room is considered to be a work area. The Board argues that this room often serves as a lunch room for certain employees.

> The Company failed to demonstrate any substantial business or economic justification for extending its rule from working areas to non-working areas physically separated from the work areas, and used by employees on their non-working time on their way to the break room, smoking areas, restrooms, water fountains or in and out of the plant.

[2] The law is well-settled that it is within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during *working hours*. *N.L.R.B. v. Daylin, Inc.*, 496 F.2d 484, 487 (6th Cir. 1974). It is not within the province of an employer, however, to promulgate and enforce a rule prohibiting union solicitation by an employee outside of *working hours*, although on company property.[6] Absent special circumstances, time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, even though the employee is on company property. *Republic Aviation*, 324 U.S. at 804, 65 S.Ct. at 988.

We now recite that rule with incredible ease. Although the rule on its face does indeed seem very simple, the term "working hours" is the progeny of various phrases, which have caused much confusion and controversy over the past few decades. In *Campbell Soup Co. v. N.L.R.B.*, 380 F.2d 372 (5th Cir. 1967), we held invalid for vagueness and indefiniteness a ban on

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[6] *Id.* This standard was first announced by the Board's ruling in *Peyton Packing Co.*, 49 N.L.R.B. 828 (1943), and was approved by the Supreme Court in *Republic Aviation v. N.L.R.B.*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945).

solicitation during "Company working hours."[7] A prohibition against solicitation during "paid working hours" also has been held to be overly broad and violative of 8(a)(1). *Daylin*, 496 F.2d at 484. In *Florida Steel Corp. v. N.L.R.B.*, 529 F.2d 1225 (5th Cir. 1976), we held that a company's prohibition of solicitation "on the company's time" was similarly overly broad. These terms failed because employees could easily interpret them to bar solicitation during the entire time the employee was clocked in, including such non-working times as rest periods and coffee breaks.

In *Daylin*, the retail store's no-solicitation rule prohibited all solicitation on its premises during "paid working hours." The Court held that the rule was overbroad and invalid, stating that although the "rule

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[7] At first glance, there appears to be no significant difference between Cooper's prohibition of solicitation during "working hours" and Campbell Soup's prohibition during "company working hours." However, the terms "paid working hours," "company working hours" and "company time" inherently suggest that solicitation is banned at all times while the employee is "clocked in." Phrases such as "working hours" and "working time" instead imply that solicitation is permitted as long as the employees, both the solicitors and solicitees, are not actively performing job duties.

In N.L.R.B. v. Intermedics, Inc., 715 F.2d 1022 (5th Cir. 1983), we declined to decide whether the company's flat rule barring solicitation during "working time" was invalid. *See id.* at 1027. Similarly, in *N.L.R.B. v. Trailways, Inc.*, 729 F.2d 1013, 1018 (5th Cir. 1984), we questioned in dictum whether the term "working hours" was lawful, recognizing that the Board previously had found that this term could reasonably be interpreted by employees to include meals, breaks or other non-working time. *See Essex Int'l, Inc.*, 211 N.L.R.B. 749 (1974).

To resolve much of this confusion, we again observe that it "would not be difficult for parties to develop wording in a collective agreement or in rules which would make very clear that the only kind of solicitation given a blanket prohibition is solicitation" occurring while either the solicitors or solicitees are "actively performing job duties." *Intermedics*, 715 F.2d at 1027.

would, of course, properly and lawfully forbid such solicitation on the selling floor . . ., or in situations where such activity interfered with job performance, . . . it would also purport to forbid employees from 'soliciting' union membership on break time, in restrooms and in waiting time." *Daylin*, 496 F.2d at 487 [citations omitted]. Because the plain language of the rule showed that it could be enforced to bar solicitation en route to and from the time on the clock, on break time and in the restrooms, the Court held that the rule was barred by *Republic Aviation* and by much of the subsequent case law. *Id.* at 488.

[3] Cooper's no-solicitation rule legally bans all solicitation during "working hours." The term "working hours" does not include break periods, whether informal or regularly scheduled. Cooper's rule also bans solicitation during non-working hours in areas Cooper treats as working areas: the smoking area, restrooms and areas surrounding water fountains. We reiterate that periods of rest and lunch periods have been held to be the employees' own time, even though the employee is on company property; and a no-solicitation rule may not be applied during such periods absent special circumstances.

Cooper first argues that its no-solicitation rule is valid on its face based on *Central Freight Lines, Inc. v. N.L.R.B.*, 653 F.2d at 1023. In *Central Freight*, the company maintained an oral no-solicitation rule. The rule was informally announced at a meeting held on the company's loading dock by a company supervisor: "I would prefer that [solicitation] be contained to your lunch breaks, your coffee breaks and before and after work. I don't want to see it any more *on this dock*

during company work hours." *Id.* at 1026 (Emphasis added).

We upheld the company's rule in *Central Freight*, and refused to enforce the Board's finding that the rule was overly broad, reasoning that the "Company's no-solicitation rule, being restricted to work areas and work time, was valid on its face." *Id.* Cooper argues that its rule restricting solicitation to non-working hours and non-working areas is similarly valid on its face.

The difference between *Central Freight* and this case lies in the fact that Central Freight's rule barred solicitation on the dock, an actual working area, during working hours. In contrast, Cooper's no-solicitation rule prohibits solicitation during break times in certain break areas, such as the smoking area and restrooms. Absent a showing of special circumstances, Cooper's rule is therefore invalid under *Republic Aviation*.

[4] Cooper alternatively argues that even if the rule is not valid on its face under *Central Freight*, special circumstances exist in its case which justify banning solicitation at all times in these areas. Cooper submits that the evidence concerning its continuous operation and staggered shift and break times justifies its ban on solicitation in certain break areas.[8] Cooper further asserts that it should not be required to take the risk that a non-working employee will disrupt the production of employees who are continuing to work, since

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[8] Cooper also relies upon its study of efficiency and productivity during 1984. A management team, sent to Tupelo to examine desirable employee relations policies, concluded that in Cooper's plants permitting solicitation, the constant activities of people selling resulted in disruption and loss of productivity.

some employees will be working while other employees are on their breaks, or arriving or leaving work.

We do not agree. Even a rule prohibiting union solicitation in actual working areas at all times has been upheld only in certain settings.[9] Stores and restaurants have come within a well-recognized exception to the general rule because of special circumstances.[10] In *N.L.R.B. v. May Dept. Stores Co.*, 154 F.2d 533 (8th Cir. 1946), the Court approved the Board's order banning solicitation at all times on the selling floor of the retail store, including during the employees' lunch hour. Both the Board and the Court reasoned that even though the soliciting employee and the employee being solicited are on their lunch hour, solicitation on the selling floor where customers are normally present could be disruptive of the employer's business.

We have discovered only one solicitation case involving a continuous production facility. In *N.L.R.B. v. Texas Aluminum Co.*, 300 F.2d 315 (5th Cir. 1962), the company's no-solicitation rule prohibited all "solicitation on company property." The company attempted to defend its broad rule by arguing that special circumstances made the rule necessary in order to maintain production and discipline. *Id.* at 316. The company

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[9] The Board found Cooper's no-solicitation rule invalid because it banned solicitation during non-working hours in certain break areas. Thus, we need not decide today whether a ban on solicitation during non-working hours in actual working areas is valid.

[10] *Times Publishing Co. v. N.L.R.B.*, 605 F.2d 847 (5th Cir. 1979). Hospitals, like restaurants and retail stores, by their very nature also exhibit special circumstances. In *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 506, 98 S.Ct. 2463, 2473, 57 L.Ed 2d 370, 389 (1978), the Supreme Court recognized that health care facilities may prohibit organizational activity in patient care and therapy areas at all times.

claimed that since it did not have any particular rest time and the employees could take their rest or coffee breaks at any time, the rule was necessary to prevent employees interfering with each other during working hours.

Like Cooper's Tupelo plant, the plant operated on three shifts of eight hours each, resulting in continuous production; employees took their 20-minute lunch breaks at different times; and employees freely enjoyed coffee or rest breaks as needed. We stated in *Texas Aluminum* that the Company had the burden to prove that there was more interference with work than would have been the case if it had not adopted the rule or had maintained a regular rest period. Due to the absence of such proof, we affirmed the Board's order, invalidating the rule. *Id.*

Likewise, Cooper was required to show that special circumstances exist which justify the prohibition on solicitation near water fountains, the smoking area, in restrooms and along the way to the main break room. As in *Texas Aluminum*, we agree with the Board that Cooper failed to sufficiently demonstrate such special circumstances.

Soliciting union membership inevitably involves speech. Speech is not only a right protected by the Act, it is also a right protected by the First Amendment. See *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945). Since Cooper employees are most assuredly permitted to chat about the upcoming football game or the new movie in town at the water fountains, restrooms and smoking areas, casual conversation about union meetings and other union matters can similarly

take place at these locations, even though Cooper technically considers them to be working areas.

[5] Lastly, Cooper argues in the alternative that even though its rule officially bans solicitation in areas such as the smoking area and other certain break areas, there is no evidence that any employee was ever disciplined for soliciting in those areas and that therefore its rule is valid. We are not persuaded.

In *Birmingham Ornamental Iron Co. v. N.L.R.B.*, 615 F.2d 661 (5th Cir. 1980), the company's employee handbook contained a rule which prohibited "any solicitation on company premises and time without prior approval of management." Although the company conceded that the rule on its face was invalid, it contended that their rule had been communicated or applied in such a way as to convey an intent clearly to permit solicitation during break time or other periods where employees are not at work. *Id.* at 667.

We found in *Birmingham Ornamental Iron* that the only solicitation rule ever communicated to the employees was the facially invalid one. Further, we rejected the company's contention that the failure of employees to complain about the rule over the years was negative evidence sufficient to show the company's clear intent to permit solicitation. *Id.* at 667.

Cooper's argument fails for the same reasons. Cooper has put forth no evidence demonstrating that it communicated to employees a no-solicitation rule which would permit solicitation in areas such as the restrooms, smoking area and near the water fountains. Cooper has in fact admitted that it does not openly condone solicitation in these areas.

Modifying the Order

[6] Although we agree with the Board that Cooper's no-solicitation rule is invalid for the reasons explained above, we can not fully endorse the Board's order as written. The order mandates that Cooper rescind its no-solicitation rule. We hold that Cooper may retain its no-solicitation rule insofar as it allows solicitation in all break areas.[11]

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[11] Accordingly, we delete paragraphs 1(a), 1(b) and 2(a) from the Board's order, which require Cooper to:

> 1. Cease and desist from
>
> (a) Maintaining and enforcing an unlawfully broad no-solicitation rule or disparately enforcing any such rule.
>
> (b) Suspending, discharging, or otherwise disciplining its employees for alleged violations of that no-solicitation rule.
>
> 2. Take the following affirmative action necessary to effectuate the policies of the Act.
>
> (a) Rescind its unlawfully broad no-solicitation rule.

We amend 1(a), (b) and 2(a) to read as follows:

> 1. Cease and desist from
>
> (a) Maintaining and enforcing a no-solicitation rule that bans solicitation during any break times or in any break areas, including the smoking area, restrooms, areas surrounding the water fountains and pathways to the main break room, when both the solicitor and solicitee are on break time, whether informal or scheduled, and are in a break area.
>
> (b) Suspending, discharging, or otherwise disciplining its employees for violations of a no-solicitation rule that bans solicitation during any break times or in any break areas, including the smoking area, restrooms, areas surrounding the water fountains and pathways to the main break room, when both the solicitor and solicitee are on break time, whether informal or scheduled, and are in a break area.

(2) Validity of Rye's Discharge and Pickering's Suspension

(a) Mitzi Rye

[7] Mitzi Rye was the first and only employee terminated in connection with Cooper's no-solicitation policy. Cooper hired Mitzi Rye on February 10, 1986, and in May of 1987, she began work as a first-stage tire builder. In October, 1987, after signing an authorization card, Rye agreed to become an in-plant organizer for the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CIC (the Union).

After Cooper management received reports from employees in early October, 1987 that Rye was soliciting on behalf of the Union on work time,[12] Rye was asked to meet with management and was warned about violating Cooper's no-solicitation rule.

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2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Modify its no-solicitation rule to allow solicitation during any break times or in any break areas, including the smoking area, restrooms, areas surrounding the water fountains and pathways to the main break room, when both the solicitor and solicitee are on break time, whether informal or scheduled, and are in a break area. However, Cooper need not amend its no-solicitation rule to permit solicitation in actual working areas, i.e., in the immediate areas surrounding continuously operating machines.

[12] Shift foreman Sonny Shelton stated at the Board's hearing that Rye started building approximately 45 or 50 fewer tires per day and began spending excessive time away from her work area. Shelton testified that as a result, he twice informally warned her to correct this behavior.

After this incident, Rye was again summoned to meet with Cooper management, based upon a written statement from one of her coworkers indicating that Rye continued to solicit on work time. Cooper suspended Rye pending the results of an intensive investigation conducted by management to discover the extent to which Rye violated the no-solicitation rule. *See* discussion on interrogation *infra*. Upon the completion of its investigation, Cooper concluded that Rye repeatedly and continuously violated its no-solicitation policy and discharged Rye.

(b) Rocky Pickering

Rocky Pickering was hired by Cooper in July of 1987 as a tugger operator in the first stage tire assembly department, which required him to move materials from one department to another with a motorized tugger. In October, 1987, Pickering signed a Union authorization card and joined the Union's in-plant organizing committee. Pickering was suspended for three days for passing out Union literature on working time and in a working area.[13]

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[13] It is undisputed that on February 20, 1988, while Pickering was working the night shift, he stopped his tugger at about 11:30 p.m. to ask another tugger operator, Jerry Riddle, to supply the tire builders with certain materials. During the course of the conversation, Pickering asked Riddle if he had seen a newspaper clipping describing a cost-of-livingwage adjustment ("COLA") recently given to employees at Cooper's unionized Texarkana plant. Pickering's supervisor, Jimmy Greene, then approached and saw the clipping. Pickering showed the article to Greene, asked him if he had seen it, and Greene replied that he had not.

Greene left and immediately reported the incident to foreman Spike Rice who in turn reported it to shift foreman Jim Fitzgerald. Fitzgerald called Pickering into his office and asked him if he had handed a newspaper clipping to Riddle on company time. After Pickering admitted

(c) The Remedy

The Board found that (1) since it deemed Cooper's no-solicitation rule invalid, Rye's discharge and Pickering's suspension based on that rule were invalid; (2) Cooper engaged in discriminatory enforcement of the rule; and (3) Cooper's reason for dismissing Rye and suspending Pickering was pretextual, i.e., that Cooper disciplined Rye and Pickering because of their union activity, not for violations of its no-solicitation rule. We hold that Cooper's disciplinary actions against Rye and Pickering were both discriminatory and pretextual in violation of sections 8(a)(1) and 8(a)(3) of the Act.

Discriminatory enforcement of no-solicitation rules may result from charging violations where none exist, or by applying the rule selectively. The Board found that although Cooper almost always enforced its no-solicitation rule,[14] it did so inconsistently and was much

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that he had, Fitzgerald sent Pickering home.

Employee relations manager Chuck Taylor then spoke with Pickering and commented, "Well, didn't Mark Stewart [Pickering's co-worker] talk to you? . . . We sent him to talk to you about your Union activities. . . . Didn't he warn you that you were going to get in trouble about your Union activities?" Taylor gave Pickering a three-day suspension and placed a memo in Pickering's file, which noted that he had been issued a final warning for violation of the no-solicitation rule.

[14] The parties stipulated to the following diversions from the no-solicitation rule: Cooper officially sponsored an annual drive for the United Way; and certain supervisors and employees solicited employees on work time in work areas in 1986 and 1987 for birthdays, Christmas presents, flowers for employees in the hospital, the company newsletter and a company-sponsored fishing trip.

In spite of these solicitations and after lengthy testimony, the Board maintained, "There is no question that Chuck Taylor followed a uniform

more harsh in its punishment as to Rye and Pickering. The record contains substantial evidence to support the Board's finding that Cooper unevenly applied its no-solicitation rule.

[8] In a section 8(a)(3) discharge or suspension case, once the employer has articulated a legitimate business reason for its actions, the burden is upon the general counsel to present substantial evidence that anti-union animus was the moving cause of the disciplinary measures. *TRW, Inc. v. N.L.R.B.*, 654 F.2d 307 (5th Cir. Unit A 1981). Cooper advanced as its legitimate business reason the fact that Rye and Pickering solicited in work areas. However, the record contains substantial evidence showing that Cooper pretextually used the alleged violations of its no-solicitation rule to discharge Rye and suspend Pickering.

The Board found that in March of 1988, a plant engineering secretary solicited donations for a gift for a plant engineer by typing and sending a memo to this effect on working time and in a work area. Employee relations manager Chuck Taylor told the secretary that she was violating the no-solicitation rule and warned her to stop or she could lose her job.

In October of 1987, the Board found that an employee on work time asked other employees to come to his home to meet a political candidate. When he asked Taylor, he was warned that this activity might be construed as solicitation in violation of Cooper's rule. The record supports the Board's finding that numerous

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policy against any form of solicitation by any employees or supervisors. . . . There is no evidence that the rule was disregarded, or overlooked on any widespread or general basis."

other employees were similarly warned in 1987 and 1988 for selling Girl Scout cookies, soliciting money for a football pool and collecting donations for sick employees and relatives and the March of Dimes.

The Board found that in all cases, employees were informally admonished that they were violating Cooper's no-solicitation rule and that no other disciplinary action was taken. There were no formal meetings and no final warnings resulting in discharge. In comparison, the Board found that Cooper showed a much more intense concern over violations of the no-solicitation rule in cases of union solicitation than it did for other violations of the rule.

We agree with the Board. First, unlike other employees who violated Cooper's no solicitation rule, the record shows that Rye was summoned to the tire assembly department manager's office to respond to accusations.[15] Second, the record supports the finding that Rye's supervisor pressured one of Rye's co-workers, Dean Johnson, to give a written statement about Rye's alleged solicitations during working time; and even wrote the statement for Johnson, turning what might have been an innocuous exchange between Rye and Johnson into a clear violation of the no-solicitation

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[15] On October 23, 1987, Paul Smith, manager for the tire assembly department at the time, and Chuck Taylor, employee relations manager, summoned Rye into Smith's office to explain the no-solicitation policy and to give her an opportunity to respond to allegations that she had been soliciting during working hours. Rye told Smith and Taylor that she had not violated the policy. Despite Rye's denial, Shelton testified at the hearing that he believed she had been in fact soliciting on work time.

rule.[16] Lastly, the record supports the Board's conclusion that Rye's supervisor based Rye's suspension solely upon Johnson's statement and other alleged anonymous reports that she violated the rule.

Following Rye's suspension, Cooper conducted an intensive investigation concerning Rye's union solicitation activities, questioning over 150 employees. *See* discussion on interrogation *infra*. As the Board correctly points out, the language in the memo to the supervisors clearly shows that Rye's fate was sealed even before the investigation got underway. *See id.* The investigation yielded several written statements from employees about their conversations with Rye, which formed the

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[16] Rye shared a machine with co-worker Dean Johnson whose shift followed Rye's. Like most tire assemblers, Johnson arrived fifteen minutes early to relieve Rye and prepare his machine for his shift.

Johnson testified before the Board that in early June of 1988, after Rye had shut off the machine and while Johnson was preparing the machine for his shift, Rye asked him if had thought about coming to a Union meeting. After Johnson replied that he had not, Rye dropped a Union authorization card in his tool box and left.

On June 24, 1988, a departmental managers' meeting with tire builders on the night shift was held. According to Production Manager Terry Jarzen's testimony, the meeting was called to discuss the distribution of Union cards at the plant. Employees were told to notify management if they were given a Union card on company time.

During the meeting, Johnson told co-worker Debra Blake that he had been given a card by Rye, who in turn relayed this information to Supervisor Ricky Swords. Armed with this information about Rye, Swords later approached Johnson and asked him if Rye gave the card to him while on "company time." He responded, "Yes, I guess. It was at my machine." Johnson testified that he then talked to Jarzen about the incident and agreed to give a written statement.

basis for Rye's discharge.[17] We agree with the Board that these conversations were only of a few second's duration and there was no evidence that any conversation resulted in or had the potential for disruption.

With respect to Pickering, the Board found that after being summoned to foreman Fitzgerald's office, he was immediately suspended even though this was his first reported violation of Cooper's no-solicitation rule. Unlike others who had violated the rule, Pickering was

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[17] Kenny Dowdy worked in the same group and shift as Rye at a tire building machine about 30 feet away. His statement reflected that Rye approached him twice about the union. First, Rye dropped a UAW authorization card in Dowdy's tool box and said, "You might need this." The other time Rye suggested that he go to a Union meeting. Dowdy's statement read that although there was no pressure to do anything, both events happened during his "work time" and in his "work area."

Randy Spencer's statement provided that in June, he was also approached by Rye during both his "work time" and in his "work area." She asked him to join the Union and explained that she thought the Union could correct the seven-day rotating shift at Cooper.

David McRay worked at a machine next to Rye and was on the same shift. His statement provided that he and Rye made a bet for $700 during "work time" and "in a work area" that the Union would not succeed at Cooper.

Terry Jones was a tire builder on another shift and gave the statement that in June, "Mitzi Rye came by my m[a]chine 67 in tire assembly and ask me would I sign a UAW card."

At the Board's hearing, however, these employees contradicted their earlier statements in varying degrees. In addition, Rye's version of these conversations substantially differed from the written statements. According to Rye, McRay walked over to her machine; offered to bet her $700 that the Union would not succeed; and after she accepted the bet, McRay walked back to his machine. Rye further testified that she would occasionally talk to Dowdy about the Union only during their common lunch break, while walking to the lunch room or outside of the plant.

never given the benefit of an informal or formal warning. It was common knowledge around Cooper that Pickering was a union activist. Based upon all the evidence, including Greene's testimony that they had been waiting to "get" him for something, the ALJ believed that Cooper "was lying in wait for Pickering to break the rule."[18]

Recognizing that the ALJ is in a unique position to evaluate the credibility and the demeanor of the witnesses, we defer to plausible inferences he drew from the evidence, even though we might reach a contrary result were we deciding the case *de novo*. We find that the Board's finding of disparate enforcement and pretext are supported by substantial evidence. It is undisputed that both Rye and Pickering were productive employees who experienced no other work-related problems. We find it difficult to believe that Cooper would have discharged or suspended an otherwise satisfactory employee who committed the offense of soliciting for a charitable bake sale. We are persuaded that the actual reason for Rye's discharge and Pickering's suspension was that they were organizing a union, and we therefore fully enforce this portion of the Board's order.

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[18] Pickering testified at the Board's hearing that as he left the meeting with foreman Fitzgerald and Greene, Pickering asked Greene how long they were trying to "get" him for something, and Greene responded "three months."

Although Greene denied making this statement, the ALJ credited Pickering's testimony.

(3) Interrogation

[9] The Board summarily found that Cooper violated section 8(a)(1) by unlawfully interrogating employees. In just one sentence, the Board justified its finding by explaining that in Cooper's investigation of Rye, supervisors failed to give assurances to employees that they need not answer, and that no retaliation would be taken against them.

[10] An employer with a legitimate cause may interrogate employees on union matters without incurring section 8(a)(1) liability. *N.L.R.B. v. Ambox, Inc.*, 357 F.2d 138 (5th Cir. 1966). An interrogation becomes illegal when the "words themselves or the context in which they are used . . . suggest an element of coercion or interference." *Id.*

[11] In determining whether a company's interrogation of employees is unlawful, several factors, commonly known as the *Bourne* criteria, should be considered:[19] (1) the history of the company's attitude toward its employees; (2) the type of information sought; (3) the rank of the interrogator in the company hierarchy; (4) the place and manner of the interrogation; (5) the truthfulness of the employee's response; (6) whether the company had a valid purpose in obtaining information concerning the union's strength; (7) whether the company communicated this purpose to the employ-

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[19] These criteria were originally enumerated by the Second Circuit in *Bourne v. N.L.R.B.*, 332 F.2d 47, 48 (2d Cir. 1964). They were adopted and augmented by us in *N.L.R.B. v. Camco, Inc.*, 340 F.2d 803 (5th Cir. 1965) and have been consistently employed since that time. *See TRW, Inc. v. N.L.R.B.*, 654 F.2d 307 (5th Cir. Unit A 1981).

ees; and (8) whether the company assured the employees that no reprisals would be taken.

The Board found illegal interrogation in violation of section 8(a)(1) of the Act, as interpreted under the rules first established in *Johnnie's Poultry Co.*, 146 N.L.R.B. 770, 774-75 (1964), enforcement denied on other grounds, *United States v. Motorlease Corp.*, 334 F.2d 617, 619 (8th Cir. 1964).[20] Nowhere in the Board's decision or in the ALJ's findings is there any indication that the *Bourne* criteria were applied. We again admonish the Board for refusing to comply with Fifth Circuit precedent by failing to apply the *Bourne* factors.[21] Fortunately, however, the ALJ has supplied us with enough facts in this case so that we may apply the criteria listed above and avoid the necessity of a remand.

Cooper's Investigation

It is undisputed that on June 27, 1988, Taylor prepared a memorandum detailing a department-wide investigation of Rye's union activities. The memo informed supervisors as follows:

> As you are probably aware, Mitzi Rye has been suspended for violating Cooper's no-solicitation policy.

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[20] *See also N.L.R.B. v. Neuhoff Bros. Packers, Inc.*, 375 F.2d 372, 377-78 (5th Cir. 1967); *Standard-Coosa-Thatcher Carpet Yarn v. N.L.R.B.*, 691 F.2d 1133, 1141 (4th Cir. 1982).

[21] *See Fiber Glass Systems, Inc. v. N.L.R.B.*, 807 F.2d 461 (5th Cir. 1987); *Marathon Le Tourneau Co. v. N.L.R.B.*, 699 F.2d 248 (5th Cir. 1983); *Dow Chem. Co. v. N.L.R.B.*, 660 F.2d 637 (5th Cir. 1981); *TRW, Inc. v. N.L.R.B.*, 654 F.2d 307 (5th Cir. 1981); *TRW-United Greenfield Div. v. N.L.R.B.*, 637 F.2d 410 (5th Cir. 1981); *Paceco v. N.L.R.B.*, 601 F.2d 180 (5th Cir. 1979); *Delco-Remy Div., General Motors Corp. v. N.L.R.B.*, 596 F.2d 1295 (5th Cir. 1979); *Federal-Mogul Corp. v. N.L.R.B.*, 566 F.2d 1245 (5th Cir. 1978).

> Apparently, she has solicited . . . or distributed materials for an outside organization on work time and in work areas. Since she has previously been warned concerning this, it seems clear that she willfully and intentionally violated this policy.
>
> In order to insure that she is being treated fairly, Cooper is making a full investigation into this before any final decision is made concerning her future employment. As such I need to ask you a couple of questions. The purposes of these questions is to find out the degree to which Mitzi violated our no-solicitation policy, not to find out if you agreed or disagreed with what she may have been soliciting you about.

The memo then instructed supervisors to explain Cooper's no-solicitation policy to each employee and then ask the employee a series of questions:

> Has Mitzi ever asked you, during work time and in a work area, to sign an authorization card or attend meetings for any organization? to contribute money on behalf of any organization?
>
> Are you aware of any cases where she has handed out printed materials during work time in the work area?
>
> Are you aware of any other employees who have violated the no-solicitation/no-distribution policy?
>
> If you ever have any questions concerning whether or not an activity is in violation of this policy, simply ask me or your employee relations supervisor.

Between June 27 and June 29, 1988, four supervisors moved through the tire building department and asked more than 150 employees the prescribed questions. Supervisors Shelton, Swords, Rodney Rice and Lawrence Dangerfield testified before the Board that if a particular employee did not want to answer the questions, they did not pressure that employee to answer. Several employees agreed to give written statements.

Applying the *Bourne* factors, we conclude:

(1) The record is silent as to the history of Cooper's attitude toward its employees;

(2) Cooper sought general information about violations of its no-solicitation policy, and specifically, whether Rye ever solicited during work time and in work areas. Although supervisors failed to inform employees that their answers would not be used against them later, the record indicates that most employees voluntarily offered responses;

(3) The supervisors asking the questions were generally shift foremen and low-level supervisors;

(4) The investigation was conducted throughout the tire assembly department. Supervisors moved through the employees' work stations in order to ask the questions;

[12] (5) Four employees offered to give written statements while others chose to have their answers to the supervisors' questions remain anonymous. Based on the permitted anonymity and the fact that others were willing to give written statements, most employees should have felt comfortable in offering

truthful answers. The potential exception is Randy Spencer. In his written statement, Spencer stated that Rye approached him on the tire assembly floor about joining the union while he was working and while she should have been working. Later, at the Board's hearing, both Spencer and Rye testified that Rye approached him at the water fountains while he was "joking around" with several other employees. This contradiction, however, is not significant enough to render Cooper's investigation illegally coercive;

(6) & (7) The purpose of Cooper's interrogation was not to gain information about the union's strength; and

[13] (8) Cooper did not assure its employees that no reprisals would be taken. However, this alone would not be enough to constitute a section 8(a)(1) violation.

When all the factors above are examined, Cooper's investigation into Rye's violations of its no-solicitation policy was legitimate and did not constitute unlawful, coercive interrogation about union activities.[22] We

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[22] *Compare TRW, Inc. v. N.L.R.B.*, 654 F.2d at 307, where this court refused to hold that an interrogation and the company's attorney was unlawfully coercive. There the employee was called to report to a company conference room to meet with the attorney to discuss alleged improper union monetary reimbursement to employees. After the conversation, the attorney drafted a statement and asked the employee to sign it. She refused and the attorney prepared a second and later a third statement. Refusing to sign these statements, the employee explained that she was embarrassed about being called out of her department and how her participation might look to her fellow employees. The attorney purportedly said, "Embarrassing is when I'm going to subpoena you -- I'm going to go and pull you out of [the] carbon department and take you to court, and then you'll have to testify, then that's embarrassment." The attorney then ordered the employee to leave. *Id.* at 314-15. We found that "the interview, although perilously close, did not reach the level of an unlawful interrogation." *Id.* at 315.

therefore modify the Board's order, deleting paragraphs 1(c), (d) and (e).[23]

Conclusion

For the above reasons, we enforce the Board's order as modified.

ORDER MODIFIED and ENFORCED.

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[23] Paragraphs 1(c), (d) and (e) order Cooper to "cease and desist" from:

> Creating the impression that its employees' union activities are under surveillance; threatening its employees with reprisals because of their union activities; and interrogating its employees about their own or others' union activities without first having given these employees proper safeguards against retaliation or discrimination.

JUDGMENT ADOPTING PROPOSED NLRB ORDER

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

June 1, 1992

TO ALL COUNSEL OF RECORD:

No. 90-4892 Cooper Tire & Rubber Company
vs. National Labor Relations Board

(NLRB# 145)

Dear Counsel:

On April 30, 1992 the judgment proposed by the National Labor Relations Board was entered pursuant to Rule 19 of the Federal Rules of Appellate Procedure.

Please be advised that at the direction of the Court an amended judgment as proposed by the National Labor Relations Board has this day been entered.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By_____
Barry W. Stiebing, Chief
Judicial Support Division

BWS:dc

Mr. Michael T. McMenamin
Ms. Nancy A. Noall
Ms. Aileen Armstrong
Mr. Gerard P. Fleischut

MOTION WITH PROPOSED NLRB ORDER

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COOPER TIRE & RUBBER COMPANY	)	
Petitioner	)	
v.	)	No. 90-4892
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	

MOTION TO MODIFY OPINION

The National Labor Relations Board, by its Deputy Associate General Counsel, asks the Court to modify its opinion herein insofar as the opinion (slip opinion, p. 3662) orders the deletion of two subsections of the Board's remedial order. That action appears to be attributable to the Court having overlooked two violations expressly found by the Board and not contested by the Company before this Court, as we show below.

1. On April 8, 1992, a panel of this Court (Circuit Judges Brown, Davis, and Barksdale) issued a decision enforcing much of the Board's remedial order but deleting the following cease-and-desist provisions (Record Excerpts, p. 36):

(c) Creating the impression that its employees' union activities are under surveillance.

(d) Threatening employees with reprisals because of their union activity.

(e) Interrogating its employees about their own or others' union activity without first having given these employees proper safe guards against retaliation or discrimination.

2. With regard to subsection 1(c), the Board found (RE 34, lines 1-7) that the Company had violated Section 8(a)(1) of the National Labor Relations Act ("the Act"), by creating the impression that its employees' union activities were under surveillance, when one of its supervisors, Jimmy Greene, told discriminatee Rocky Pickering that the Company had been waiting to "get" him. As noted in the Board's brief (p. 18 n.7), the Company expressly (Br 3, n.2) declined to contest this finding. We believe that this Court deleted subsection 1(c) under the misapprehension that this injunction was based, not upon the Green/Pickering conversation, but upon the department-wide interrogations that the panel found (sl op, pp. 3661-3662) were not in violation of the Act.

3. With regard to subsection 1(d), the Board found (RE 34, lines 12-24) that the Company made a "threat of unspecified reprisal," in violation of Section 8(a)(1) of the Act, when one of its supervisors, Candy Taylor, told employee Gary Jones that it "could look bad on his record . . . if he continue[d] his union activities." Again, as noted in the Board's brief (p. 18, n.7), the Company expressly (Br 3, n.2) declined to contest this finding. Again, we believe that this Court struck down subsection 1(d) under the misapprehension that this injunction

was based exclusively on the department-wide interrogations found lawful by the Court.

4. Inasmuch as subsections 1(c) and 1(d) of the Board's remedy are based squarely on findings that the Company did not contest, we respectfully suggest that the Court struck them down by inadvertence and we respectfully submit that they are entitled to be enforced. Accordingly, we are submitting with this motion a proposed judgment that modifies the form of judgment earlier submitted to this Court in order to reflect the relief requested herein.

WHEREFORE, the Board respectfully asks that this motion be granted and that the Court enter the form of judgment attached hereto.

Aileen A. Armstrong
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.
this 4th day of May, 1992
(H:cooper.mot)

NLRB ORDER

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COOPER TIRE AND RUBBER COMPANY,	)	
Petitioner,	)	
v.	)	No. 90-4892
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

JUDGMENT

Before: BROWN, DAVIS and BARKSDALE, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Cooper Tire and Rubber Company, to review an order of the National Labor Relations Board issued on September 27, 1990, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on September 3, 1991, and has considered the briefs and transcript of record filed in this cause. On April 8, 1992, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Cooper Tire and Rubber Company, Tupelo, Mississippi, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) maintaining and enforcing a no-solicitation rule that bans solicitation during any break times or in any break areas, including the smoking area, restrooms, areas surrounding the water fountains and pathways to the main break room, when both the solicitor and solicitee are on break time, whether informal or scheduled, and are in a break area.

(b) Suspending, discharging, or otherwise disciplining its employees for violations of a no-solicitation rule that bans solicitation during any break times or in any break areas, including the smoking area, restrooms, areas surrounding the water fountains and pathways to the main break room, when both the solicitor and solicitee are on break time, whether informal or scheduled, and are in a break area.

(c) creating the impression that its employees' union activities are under surveillance.

(d) Threatening its employees with reprisals because of their union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) modify its no-solicitation rule to allow solicitation during any break times or in any break areas, including the smoking area, restrooms, areas surrounding the water fountains and pathways to the main break room, when both the solicitor and solicitee are on break time, whether informal or scheduled, and are in a break area. However, Cooper need not amend its no-solicitation rule to permit solicitation in actual working areas, i.e., in the immediate areas surrounding continuously operating machines.

(b) Make Rocky Pickering whole for any loss of earnings and other benefits resulting from his suspension, in the manner set forth in the remedy section of the judge's decision.

(c) Remove from its records any references to the suspension of Rocky Pickering on February 21, 1988, and notify him in writing that this has been done and that evidence of this suspension will not be used as a basis for future personnel actions against him.

(d) Offer Mitzi Rye immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and make her whole for any loss of earnings and other benefits resulting from her discharge, in the manner set forth in the remedy section of the judge's decision.

(e) Remove from its records any references to the discharge of Mitzi Rye on June 29, 1988, and notify her in writing that this has been done and that evidence of this discharge will be not used as a basis for future actions against her.

(f) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(g) Post at its facility in Tupelo, Mississippi, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 26 of the National Labor Relations Board (Memphis, Tennessee), after being signed by the Petitioner's authorized representative, shall be posted by the Petitioner immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply.

ENTERED:

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has **found** that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives-employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted-activities.

WE WILL NOT maintain and enforce a no-solicitation rule that bans solicitation during any break times or in any break areas, including the smoking area, restrooms, areas surrounding the water fountains and pathways to the main break room, when both the solicitor and soliciteee are on break time, whether informal or scheduled, and are in a break area.

WE WILL NOT suspend, discharge, or otherwise discipline our employees for violations of a no-solicitation rule that bans solicitation during any break times or

in any break areas, including the smoking area, restrooms, areas surrounding the water fountains and pathways to the main break room, when both the solicitor and solicitee are on break time, whether informal or scheduled, and are in a break area.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT threaten our employees with reprisals because they engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Rocky Pickering whole for any loss of earnings and other benefits resulting from his suspension, with interest.

WE WILL remove from our records any references to the suspension of Rocky Pickering on February 21, 1988, and notify him in writing that this has been done and that evidence of this suspension will not be used as a basis for future personnel actions against him.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COOPER TIRE & RUBBER COMPANY	)	
Petitioner	)	
v.	)	No. 90-4892
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that (2) two copies of the motion to modify opinion in the above captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Michael T. McMenamin, Esquire
Nancy A. Noall, Esquire
Walter, Haverfield, Buescher & Chockley
1215 Terminal Tower
Cleveland, Ohio 44113

Aileen A. Armstrong
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.
this 4th day of May, 1992

(H:cooper.mot)

ORDER OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4892

COOPER TIRE & RUBBER COMPANY,	)	
	)	Petitioner-Cross-Respondent,
versus	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	Respondent-Cross-Petitioner.

Petitions for Review of an Order of the
National Labor Relations Board

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion APRIL 8, 1992, 5 Cir., 198__, _____ F.2d ____)

(JULY 8, 1992)

Before BROWN, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having noted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

NLRB OPINION WITH ALJ DECISION ATTACHED

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DECISION AND ORDER

On August 31, 1989, Administrative Law Judge George F. McInerny issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority, in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and

---

[1] The Respondent has excepted to some of the judge's credibility, findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge's decision contains several minor errors. Contrary to the judge's statement, at least two employees had received warnings for excessive breaks. Also, the record indicates that it was Joel Bailey, not Ricky Marshall, who wanted to take up a collection for Marshall's sister. Further, it vas Michael Hankins, not Michael Hankins, who had a conversation with Gary Jones concerning "some union cards and stuff,"

conclusions [2] and to adopt the recommended Order as modified and set out in full below.[3]

---

and Hankins did testify at the hearing. These errors do not affect the validity of the judge's findings.

The correct citation of *Storer Communications of Jefferson County, Inc.*, is 287 NLRB 890 (1987).

[2] In finding that the Respondent violated Sec. 8(a)(1) of the Act through its supervisors' questioning of more than 150 employees concerning employee Mitzi Rye's union solicitations and solicitations engaged in by any other employees, Chairman Stephens does not rely on *Johnnies Poultry Co.*, 146 NLRB 770 (1964), or *Bill Scott Oldsmobile*, 282 NLRB 1073 (1987). Rather, he finds that the questioning, under all the circumstances, would tend to coerce employees from exercising Sec. 7 rights. The employees were first told that Mitzi Rye had been suspended for violating the Respondent's "no solicitation/no distribution" policy and then were asked whether she had solicited them "during work time and in a work area" and whether they, knew of "any other employees who have violated the [Respondent's] 'no solicitation/no distribution policy.'" They were also invited to speak with supervisors if they ever thought someone might be violating the policy. We have adopted the judge's finding that the Respondent's policy as applied was unlawful in part because the Respondent's overbroad definition of working areas effectively barred union solicitation at times and in areas where the Act requires that such discussions be permitted. Thus, an employee interrogated in the massive round of questioning launched in the wake of Rye's suspension could reasonably believe that even union activities that cannot lawfully be prohibited under the Act might be reported to management by fellow employees and lead to serious disciplinary measures.

Member Devaney agrees with the judge and his colleagues that the Respondent violated Sec. 8(a)(3) and (1) by applying its no-solicitation rule in a discriminatory manner in the discharge of employee Rye and the suspension of employee Pickering and, therefore, finds it unnecessary to pass on the judge's additional finding that the Respondent also violated Sec. 8(a)(3) and (1) by discharging Rye and suspending Pickering based on the Respondent's invalid no-solicitation rule.

[3] We find merit in the General Counsel's exceptions to the judge's failure to provide a full expunction remedy in his recommended Order. Accordingly, we shall order the Respondent to remove from its records any reference to Mitzi Rye's discharge and to Rocky Pickering's suspension and to notify them in writing that this has been done and that evidence of the unlawful discharge and suspension will not be used as a basis for future personnel actions against them. We have further modified the recommended Order and notice to conform to the violations found.

ORDER

The National Labor Relations Board orders that the Respondent, Cooper Tire and Rubber Company, Tupelo, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing an unlawfully broad no-solicitation rule or disparately enforcing any such rule.

(b) Suspending, discharging, or otherwise disciplining its employees for alleged violations of that no-solicitation rule.

(c) Creating the impression that its employees' union activities are under surveillance.

(d) Threatening its employees with reprisals because of their union activities.

(e) Interrogating its employees about their own or others' union activities without first having given these employees proper safeguards against retaliation or discrimination.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Rescind its unlawfully broad no-solicitation rule.

(b) Make Rocky Pickering whole for any loss of earnings and other benefits resulting from his suspension, in the manner set forth in the remedy section of the judge's decision.

(c) Remove from its records any references to the suspension of Rocky Pickering on February 21, 1988, and notify him in writing that this has been done and that evidence of this suspension will not be used as a basis for future personnel actions against him.

(d) Offer Mitzi Rye immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and make her whole for any loss of earnings and other benefits resulting from her discharge, in the manner set forth in the remedy section of the judge's decision.

(e) Remove from its records any references to the discharge of Mitzi Rye on June 29, 1988, and notify her in writing that this has been done and that evidence of this discharge will be not used as a basis for future actions against her.

(f) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Tupelo, Mississippi, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. September 27, 1990

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain and enforce an unlawfully broad no-solicitation rule or disparately enforce any such rule.

WE WILL NOT suspend, discharge, or otherwise discipline our employees for alleged violations of that no-solicitation rule.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT threaten our employees with reprisals because they engage in union activities.

WE WILL NOT interrogate our employees about their own or others' union activities without first giving them proper safeguards against retaliation or discrimination.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our unlawfully broad no-solicitation rule.

WE WILL make Rocky Pickering whole for any loss of earnings and other benefits resulting from his suspension, with interest.

WE WILL remove from our records any references to the suspension of Rocky Pickering on February 21, 1988, and notify him in writing that this has been done and that evidence of this suspension will not be used as a basis for future personnel actions against him.

WE WILL offer Mitzi Rye immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, with interest.

WE WILL remove from our records any references to the discharge of Mitzi Rye on June 29, 1988, and notify her in writing that this has been done and that evidence

of this suspension and discharge will not be used as a basis for future personnel actions against her.

COOPER TIRE AND RUBBER COMPANY

_____

(Employer)

Dated _____

By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, Memphis, Tennessee 38104-3627, Telephone 901-722-2687.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

DIVISION OF JUDGES

COOPER TIRE AND
RUBBER COMPANY

and

Cases 26-CA-12639
26-CA-12711

UNITED RUBBER, CORK,
LINOLEUM AND PLASTIC
WORKERS OF AMERICA,
AFL-CIO, CLC

John Goree, Esq., of Memphis, Tennessee, for the General Counsel.
Nancy Noall, Esq. and Michael McMenamin, Esq. (Walter, Haverfield, Buescher & Chockley) of Cleveland, Ohio, and *Gregory E. Meyers, Esq.*, of Findlay, Ohio for Respondent Cooper Tire and Rubber Company.
George Barrett, Esq., of Nashville, Tennessee, for the Charging Party.

DECISION

GEORGE F. McINERNY, Administrative Law Judge; Based upon charges filed on May 25, 1988 in Case No. 26-CA-12639, and on July 11, 1988 in Case No. 26-CA-

12711, by United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO, CLC, herein referred to as the Union, the Regional Director for the 26th Region of the National Labor Relations Board, herein referred to respectively as the Regional Director and the Board, issued an Order on August 8, 1988 consolidating these two cases, together with a Consolidated Complaint and Notice of Hearing. The Consolidated Complaint alleges that Cooper Tire and Rubber Company, herein referred to as the Company, or Respondent, had violated and continues to violate the National Labor Relations Act, as amended, 29 U.S.C. 151 *et. seq.*, herein referred to as the Act. The Company filed a timely answer in which it denied committing any unfair labor practices.

Thereafter, the matter came on to be heard before me in Tupelo, Mississippi on November 14 through 18, 1988, and January 17, 18 and 19, 1989, at which hearing all parties were represented by counsel, and had the opportunity to present testimony and documentary evidence; to examine and cross-examine witnesses; to present motions and argument; and to argue orally. Following the close of the hearing the Company and the General Counsel submitted briefs, which have been carefully considered.

Based upon the entire record herein, including my observation of the witnesses, and their demeanor, I make the following:

1. Findings of Facts

I. Jurisdiction

Cooper Tire and Rubber Company is a Delaware corporation having its headquarters in Findlay, Ohio,

with manufacturing facilities located in several places in the United States and Mexico including a plant for the manufacture of steel belted radial tires in Tupelo, Mississippi, the facility we are concerned with here.

The Company purchased during the 12 months just prior to the issuance of the complaint herein goods and materials valued at more than $50,000, which were received at its Tupelo plant directly from points outside the State of Mississippi.

The Complaint alleged the Answer admitted, and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The Complaint alleged, the Answer admitted, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Tupelo Plant*

For some years a company called Pennsylvania Tire had operated a tire plant in Tupelo, Mississippi. That plant closed in 1979, and early in 1984, the plant was purchased by Cooper Tire. Cooper immediately began remodelling the facility, removing or replacing all of the equipment in the plant, and enlarging its area from 600,000 to over 1,000,000 square feet. As of the date this hearing opened, there were 685 employees at the plant.

At the very beginning of Cooper's occupancy of the Tupelo facility, a management team was sent in to study all aspects of the proposed operations. The team was headed by Plant Manager Jim Dannermiller, Production Manager (later Plant Manager, after Dannemiller's departure) Bruce Smith, Gene Arnold, Plant Engineer, Bob Higgins, Industrial Engineer, Larry Bane, Comptroller, and Charles P. "Chuck" Taylor, Employee Relations Manager. The members of the group began by asking questions about tire manufacturing from every conceivable angle. They visited and studied other plants, those owned by Cooper as well as other American, French and Japanese companies. The object of all this was, in the words of Bruce Smith, to "make this new operation as productive and competitive as possible." Chuck Taylor stated that the Company "wanted a world-class plant that would be the best anywhere" - with the best attainable productivity, quality, and with a team of people who would work together to meet these goals."

Without going into detail on the manufacturing process instituted at Tupelo, suffice it to say that it was determined by the advisory group named above that the operation would be continuous, 24 hours a day, 7 days a week, with employees assigned to four groups, A,B,C, and D, with rotating shifts requiring each group to work 7 days in the day shift 7 a.m. to 3 p.m.;[1] then they would be off for 2 days. Then they would work 7 days on the afternoon shift from 3 p.m. until 11 p.m., then off another 2 days. Each group would then work 7 nights on the 11 p.m. to 7 a.m. shift, and finally, they would

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[1] These times are given for the tire assembly function. Employees assigned to material preparation reported and left one-half hour earlier; finishing and shipping employees one-half hour later.

have 3 days off before beginning the round again. In each 4 week (28 day) period, each employee would work 21 days and would be off on 7 days.

Within their shifts, employees are granted a paid 20 minute lunch break. The evidence here showed that, while some jobs, those in material preparation and finishing, were continuous operations and employees leaving their work stations needed to make sure their duties were covered, others, as in the two stages of tire assembly, could and did take their breaks together, in large numbers. In addition to the lunch break, employees also were allowed to take breaks to visit restrooms, get a drink of water at fountains set up around the plant, and to smoke in areas set aside for that purpose. There is no indication in this record either that employees abused their privileges to take restroom breaks or breaks to smoke, and no evidence that it was necessary for management to monitor or discourage excessive use of the restrooms or smoking area.

Further, there is no evidence here that employees were inhibited from conversing with each other while going to and from regular lunch breaks, informal restroom or smoking breaks, or while in the smoking or water fountain areas. Nor was there any evidence that employees could not discuss among themselves, at changes of shifts, or even while working, the kinds of things which fellow workers will tend to discuss; the weather, sports, the news of the day, social doings, romance, or shop and office rumors.[2] Some employees, apparently concerned about their ability to keep up with

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[2] Even, perhaps, hexes and spells, *Wall Street Journal*, Feb. 24, 1989.

production quotas,[3] ate their lunch at their machine or work station. Others made it a point to arrive 10 minutes or so early to sharpen and pre-heat tools, check their machine and the area around them, take measurements of the supplies on hand to determine the sizes of tires to be made.[4] While these employees were eating lunch, or arriving early, they engaged in conversations with co-workers at their machines. One employee, Dean Johnson, found that coming in early gave him a faster start. He indicated that he stopped work early in compensation for his early start, but also to give the next shift employee on his machine time to prepare to come on line without any break in production.

In its organization of the Tupelo plant, the Company set up several levels of supervision. The lowest level, leaders, were basically working forepersons whose primary responsibility was to watch over and report on those on their crews within the group, but with the duty to pitch in and work where they found it necessary, or to relieve rank and file people when they were on formal or informal breaks. At the time this hearing opened, there were 55 leaders among the 685 member workforce.

Above the leaders were 14 foremen, 12 department managers and staff members who are considered supervisors, and 6 or 7 other supervisors in technical or engineering departments.

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[3] The record shows that production quotas were very important goals for employees. Records were kept to assure continuing attainment of required production levels.

[4] This, again, applies only to the tire building, or assembly, functions in the plant.

The Company maintains its corporate headquarters and a tire plant in Findlay, Ohio, a tire plant in Texarkana, Arkansas, inner tube plants in Clarksdale, Mississippi and Piedras Negras, Mexico, and industrial products plants in Eldorado, Arkansas, Auburn, Indiana and Bowling Green, Ohio. I might note at this point that both Chuck Taylor and Plant Manager Bruce Smith have had considerable employee relations experience[5] in the Company's other plants, all of which are unionized.

B. *The No-Solicitation Rule*

1. The Rule Itself

Plant Manager Bruce Smith testified that during their study of efficiency and productivity during 1984, the management team sent to Tupelo by the Company looked at employee relations policies which would be desirable from the Company's point of view. Smith stated that the group concluded that in other plants where solicitation was permitted, the constant activities of people selling Avon products, Girl Scout Cookies, candy bars for Churches or Schools, and tickets for lotteries or benefits resulted in disruption and loss of productivity. Moreover, the fact that Cooper was going to set up a continuous, three-shift, 24 hour 7 day operation, meant that only a portion of people would be going on their break at any one time. Those employees would be walking through work areas where others were continuing to work, thus tending to disrupt the production process.

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[5] Taylor's experience is both in industrial relations and industrial engineering; Smith was almost exclusively involved in industrial and labor relations before he came to Tupelo.

For these reasons, it was decided to adopt a no-solicitation rule prohibiting solicitations by employees by distribution of printed matter or solicitation on behalf of any group or organization not only during working time, but in any working area at any time. The entire rule, as contained in an employee handbook given to all employee reads as follows:

> Each year many requests are received from organizations and individuals seeking permission to distribute literature and solicit or collect contributions for various causes. Many of these requests are made in support or worthwhile causes that are commendable; however, if all such requests were granted, it would severely damage efficiency of our operation. Therefore, it is necessary to limit such solicitations and distributions by the following rules:
>
> > Solicitations seeking contributions, payments, funds, and other solicitations or distributions of literature are not permitted on Cooper property at any time by outside groups or organizations or any person not employed at Cooper.
> >
> > No Cooper employee should be permitted to distribute any printed matter or solicit on behalf of any group or organization during working time or in any working area.
> >
> > Solicitations or distributions of printed matter by Cooper employees will be

permitted only during non-working time in non-working areas.

Smith emphasized in his testimony the Company's intention not to eliminate solicitation, but to control it, so that production was not adversely affected. He noted that the policy does not specifically prohibit solicitation by employee on behalf of a fellow employee for flowers, gifts, or funerals; for a fellow employee if his house burns down, or her mother died, or for Christmas presents. These kinds of things do cause disruption on the shop floor because someone has got to be making the solicitation, and others are receiving and considering the solicitation, thus interrupting the production process. Smith seemed to be of two minds on this point, saying, on the one hand, that this sort of thing builds moral and team spirit, brings employees closer together and has a positive effect in the plant which could outweigh the negative impact of work disruption.[6] Then, on the other hand, Smith concluded that despite these spiritual rewards, the rule does prohibit solicitation by employees on behalf of fellow employees on work time or in work areas.

Taylor's testimony was in substantial agreement with Smith's, although Taylor did not go into as much detail. Both Taylor and Smith were in agreement, and the Company makes the argument, that it had an obligation to inform people of the areas where they could, or could not, solicit. Both Taylor and Smith agreed in their testimony that the entire plant was

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[6] Smith did not agree when I asked him whether the presence of a Union might bring employees closer together.

considered a work area with the exception of the lunch (or break) room and the locker rooms.[7]

For the convenience of those, like myself, who are or will be faced with making a determination on the reasonableness, or lawfulness, of the no-solicitation rule, the Company has thoughtfully provided a diagram of the plant, showing the several manufacturing areas, location of major machinery, and other parts of the facility. On this diagram, the main area of the plant is indicated as being 430 feet along the north side, and 520 feet deep.[8] On the east side of the building is a large employee parking lot, which gives access to the main entrance. Just inside the entrance are two locker rooms, one of which is approximately 45 by 150 feet, and the other 45 by 135 feet. There is no question that these rooms are considered non-work areas.

Beyond the locker rooms, one enters the main production area. The first area encountered is the curing and finishing area, where tires are subjected to heat and pressure to combine the several elements used in their construction. This area is about 240 by 500 feet and contains over 100 machines used in the curing process. After curing, the tires are trimmed, inspected, balanced, sorted and sent to the warehouse for shipping.

Continuing west through the plant, the next production areas are the first and second stage tire building

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[7] Smith did not specify, but Taylor stated that a small locker room adjacent to the first stage tire assembly area was a work area. This room, known as a "kit" locker room, used only for storage of handbags and tools, is not used for changing clothes as are the main locker rooms.

[8] These measurements are noted on the diagram. Additional measurements given here were estimated by me based on the use of a ruler and the scale given on the diagram.

facilities. These two areas combined measure about 360 by 300 feet. There are, indicated on the diagram, 36 first stage tire building machines and 13 second stage machines.

To the south and west of the tire building area are the mixing, or material preparation, areas where the materials used in production are received and/or manufactured for use in the assembly and curing operations. The mixing areas are about 90 by 420 feet and 135 by 540 feet.[9]

Along the north wall of the plant are the offices of the
Plant Manager and other administrative and office services, the break room (about 20 by 70 feet), restrooms, and the "kit" locker room referred to earlier. Also along the north wall is the smoking area for the tire assembly area. There is a water fountain in the smoking area. Other fountains are scattered throughout the plant.

Continuing the use the scale provided on the Company's diagram of the plant. I estimate that the machines in the first stage tire building area are about 10 feet from each other in rows of 6. Each row is between 30 and 45 feet from the next row. There are six parallel rows, the nearest row to the north side of the plant being about 45 feet from the kit locker room, the water fountain and the smoking areas. The distance from the farthest first stage machine to the break room, using a normal walking route around the machine area, would

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[9] There are other areas beyond the mixing area such as a new tire building section, which was not yet in operation as of the date of this hearing, and some maintenance rooms, which are not important to our inquiry here.

be about 600 feet, and to the water fountain, about 320 feet.

In the second stage tire building area, three machines are in a line only a few feet from the north wall of the building, the nearest one being about 60 feet from the water fountain and smoking area, and about the same distance from the nearest row of first stage machines. In the second state area there is a row of 10 machines at right angles to the first 3 machines, moving away from the north wall. Between these machines and the rows of first stage machines is an area used for placement of tires moving from first to second stage. There is about 300 feet between the farthest second stage machine and the break room.

The nearest curing machines to the second stage machines are about 80 feet away. The nearest row of curing machines is about 60 or 70 feet from the area of the offices and break room. The furthest is about 480 feet to the break room. The curing department smoking area is somewhat closer by almost 200 feet from the farthest machines.

I have made these rough measurements and spent this amount of time listing those measurements here in order to show that in the working areas, particularly the first stage area, where most of the events in this case took place, there is considerable open space between machines, between rows of machines, and between the machines and break areas, either the smoking areas or the break room. The Company's position on solicitation in non-working areas is based upon the premise that in this continuous operation, people going to and from lunch, or to restrooms, or smoking areas will necessarily pass by machines in operation. Thus, to permit solicita-

tion even by employees who are not working, but merely passing through, can result in interruptions to the production process.

In addition to the physical characteristics of the working floor of this plant, I note that, while certain departments, material preparation and curing, do require employees to be relieved before they may leave their work area because of continuous operations.[10] In the first stage tire building area where there is more hand work involved, the entire group of about 30 employees has its lunch break at the same time. Some employees do eat lunch at their machines, or in the kit locker close by, and at least one employee, who was having trouble building his daily quota of tires, continued working right through the lunch break. With those exceptions, all of the first stage machines are idle for the 20 minute break period, but employers are not permitted under the no-solicitation rule to solicit or distribute printed matter in that work area, or on their way to or from the break room. Employees going to or from the break room or to the restrooms, the designated smoking areas, or water fountains, or while in these last three areas, are prohibited from distributing or soliciting, even when they encounter employees from other areas who may or may not be working.

In the circumstances noted here, taken from the undisputed testimony of Mitzi Rye, Chuck Taylor and Bruce Smith, it seems to me that the Company has failed to demonstrate any substantial business or

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[10] The curing, or vulcanizing area, however, is almost completely automated, requiring only one production employee and two leaders to monitor some 68 machines. The record shows that the production employee may be relieved for lunch break a visits to the restrooms or the smoking areas by merely requesting such relief.

economic justification[11] for extending its rule from working areas to non-working areas physically separated from the work areas, and used by employees on their non-working time as their way to the break room, smoking area, restrooms, water fountains or in and out of the plant.

Therefore, I find that the rule as promulgated prohibits solicitations during non-work periods in areas which have not been shown by Respondent to be, and which cannot be considered working areas. Therefore, I find that the rule is invalid and a violation of Section 8(a)(1) of the Act. *Our Way, Inc.*, 268 NLRB 394 (1983); cf. *Albertsons, Inc. - Southco Division*, 289 NLRB No. 39 (1988); *Ohmite Manufacturing Company*, 290 NLRB No. 130 (1988); accord, *Robinson Furniture, Inc.*, 286 NLRB No 100 (1987).

2. Enforcement of the No-Solicitation Rule

Before turning to the allegations in the Complaint dealing with the discipline meted out by the Company to Rocky Z. Pickering and Mitzi Rye, I think it would be appropriate to examine the Company's interpretation of, and application of its no-solicitation rule in two respects. The first would be its interpretation and enforcement of the rule itself, and second, its attitude toward employees it viewed as having violated the rule.

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[11] The mere assertions by Taylor and Smith that they studied the solicitation problem from a productivity point of view and then decided to promulgate this rule, does not present any objective data on which I can base a decision that this action was economically justified.

3. Interpretation and Enforcement of the Rule

There are, literally, hundreds of pages of testimony in this record dealing with this question. The General Counsel has maintained throughout that the Company's enforcement of the rule was unfair, and in violation of labor laws, because employees were allowed to solicit for and to sell all kinds of goods and services; raffle tickets, Girl Scout cookies, various catalog items such as Avon, Christmas decorations, and home interior items, collections for people who had suffered misfortunes, pyramid type schemes, holiday parties and many other causes of various kinds.

The Respondent brought in testimony indicating that maybe some of these activities had taken place, but that Respondent's position throughout the period covered here, about mid-1987 to mid-1988, it had consistently told people about the rule, what employees could or could not do, and that its supervisors and agents consistently and continuously warned employees who were observed violating the rule to stop under pain of disciplinary action.

The parties stipulated to the fact that the Company officially sponsored an annual drive for the United Way, and that certain supervisors and employees had solicited employees on work time in work areas, as follows:

> Joel Bailey, a process technician, solicited in 1985, 1986 and 1987 for a birthday fund in the laboratory.
>
> Steve Ferguson, a leader in tire assembly, had solicited for a Company Christmas party and

had condoned solicitation for flowers for an employee in the hospital.

George Greshan, a leader in tire assembly had handed out rules for a company sponsored fishing trip, and had permitted employees to read a Company newsletter on Company time.

Hal Hicks, a foreman, had solicited money to buy flowers for Terry Jarzen, a Department Manager, in December 1987 and had conducted 2 or 3 other solicitations for flowers per year.

Bruce Norwood, a leader, observed employees soliciting for Christmas presents for other leaders in December, 1986.

James Roberts, a leader, solicited for Christmas presents for shift foreman Sonny Shelton in December, 1986, and Roberts had knowledge that employees were also soliciting for Shelton's present.

Kelly Timmans (a supervisor ?) had knowledge that employees solicited for Christmas presents for leaders in December, 1987.

In addition to these stipulated diversions from the no-solicitation rule, testimony presented by the General Counsel shows a number of additional instances where employees, sometimes under the eyes of leaders or higher level supervisors, engaged in solicitations for a variety of profit-making and charitable causes.

This testimony was countered by a number of witnesses presented by Respondent (as well as respons-

es from General Counsel's witnesses on cross-examination) showing a fairly consistent recognition by supervisors of the rules and reminders to employees to desist from solicitations.

On the highest level at the Tupelo plant, there is no question that Chuck Taylor followed a uniform policy against any form of solicitation by any employees or supervisors.[12] When one works down, there are instances of supervisory people soliciting participation in a pyramid-type scheme called the "airplane game," or selling candy, or turning a blind eye to other solicitations, but there is no evidence that the rule was disregarded, or overlooked on any widespread or general basis. While lower level supervisors were not so orthodox as Taylor in their interpretations of the rule. They did tend to enforce it with some regularity as to union activity, anti-union activity, or all the other from of solicitation mentioned above, as testified to by a number of employees and supervisors in this proceeding.

If there are any problems in my finding that the rule was not enforced equitably and fairly, they arise from the confusion which existed at even the highest levels in the plant over the distinction between "inside" and "outside" solicitation; and, perhaps more significantly for employees, the question of which areas are or were "non-working" areas, where solicitation was allowed.

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[12] Even the executive secretary to the plant manager was told that posting notices of a function sponsored by a Tupelo Professional women's group could not be done on Company property. As a result of this admonition the executive secretary expressed her interpretation of the rule as not permitting any sort of solicitation "in our plant." I am aware of the incident involving Mark Stewart and Rocky Pickering, but I consider that to be isolated and connected solely with Pickering's situation which will be discussed below.

In regard to the first, I have already noted the confusion which Plant Manager Bruce Smith expressed in drawing a distinction between inside solicitation by one employee for another whose house has burned down, or whose mother has died. Smith's view was that activities of this sort tended to draw people together in a kind of (non-union) solidarity, which, in turn, would generate a positive attitude in the plant which could outweigh the negative (disruptive) effect of the solicitation. But despite these benefits, Smith admitted that the rule prohibits inside as well as outside solicitation.

This distinction between outside and inside solicitation also came up in the course of testimony of Shift Foreman Lawrence Dangerfield. In commenting on a series of incidents involving an employees named Kevin Beeks, who was involved in the fall of 1988 in selling sorghum molasses in the plant Dangerfield himself inquired about the molasses and agreed to buy some while he himself was working and in a working area. When asked whether it had occurred to him that Beeks' sale of molasses might be a violation of the Company's no-solicitation policy, Dangerfield replied that he did not because "it was not an outside organization. It was family."

The second problem I sensed in connection with the no-solicitation rule was the definition of the "working areas" where solicitation was prohibited. as I have noted above, Bruce Smith, former Production Manager and subsequently Plant Manager felt that the locker rooms, including the "kit" locker room near the first stage tire building area, were areas where solicitation was allowed. Taylor, on the other hand maintained that the small locker room was a working area.

In reviewing the testimony there are several suggestions that management's policy was to keep all solicitation out of the entire plant. Taylor did state that solicitation was baned in any working area to several employees; to Andy Love; Wayne Chilcutt; or Cathy Barnett. In other instances the impression received by employees seemed to be that solicitation was barred in the whole plant. For example, Dan Arnold was warned against solicitation on work time and in unspecified work areas in October of 1987; Edith Easley, the Executive Secretary to the Plant Manager, testified that it not only was her interpretation that there was no solicitation in the plant during working hours, but that posters she had asked to be posted could not be posted anywhere in the plant.

Despite Respondent's position that employees should be aware of what they could do, and what they could not do and where they could or could not solicit, it seems to me that employees, even high level employees like Edith Easley, and her boss, Bruce Smith, were confused about the scope of the rule,[13] and inevitably, lower level employees, would be similarly confused to a point where they might hesitate to engage in legitimate solicitation in areas or at times where such solicitation was not barred by the rule.

Taking all of these facts into consideration, I cannot infer or find that the interpretation and enforcement of the rule shows by a preponderance of the evidence that the rule was so interpreted or enforced as to show disparate treatment toward the rights of employees

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[13] Even though Smith testified that, in his opinion, the Company was obligated to tell people where they could solicit, the record does not indicate that any specific directions were given to all employees either by posting or word of mouth.

under Section 7 of the Act. The confusion as to the inside or outside solicitations was real, but there is no evidence that some outside solicitations were favored over union solicitation. Similarly, the confusion on where one could solicit would seem to operate against any form of solicitation, not merely solicitation on behalf of a union.[14]

4. Disciplinary Actions for Rule Violations

(a) *Company Procedures*

The no-solicitation rule is contained in an Employees' Handbook which is distributed to all employees on their first day of employment.

Supplementing this and the Company's other stated or implied rules of conduct for employees, Chuck Taylor prepared a memorandum on March 19, 1985, addressed to "All managers, foremen & supervisors" outlining the Company's intentions in the handling of discipline problems. Stating the Company's desire to implement a "Positive Discipline" program, Taylor outlined the philosophy and application of discipline in several Paragraphs which are quoted here in full because of their bearing on the disciplinary situations involved in this case:

> "The concept of Positive Discipline is actually a process designed to prevent problems. The focus is on solving performance problems, encouraging good performance, and using this

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[14] If I was convinced by the evidence that the confusion as to these two aspects of the interpretation of the rule was deliberately sown, I might come to a different conclusion on this aspect of the case. I really do not think that state of the evidence warrants such a conclusion.

as a management development tool. Rather than punish for poor performance, the emphasis is on praise and encouragement for good performance.

"Under this system, discipline is administered by the immediate supervisor of an individual. People over the supervisor are there to give advice and help with the decision process. Also, the Employee Relations Department is available to assist. The meetings with employees and administering of discipline is done by the immediate supervisor. As such, we must make sure that all our supervisors know how to counsel people and to get positive consequences out of every incident. Our managers will seldom work with the process people but will spend more time with supervision in giving guidance on solving performance problems.

"Employees who develop performance problems are to be dealt with in a positive manner. There should not be threats. Instead, a meeting is held to determine the cause of the problem and what can be done by working together to avoid future problems.

"There will be three basic steps in our discipline procedure:

"Step I. *Oral Reminder* - This is a friendly conversation acknowledging the problem and securing agreement to improve. This should take place in private, in an office where both the employee and supervisor try to determine the

cause of the problem and what each can do to improve the situation. No official record of this meeting is placed in the employee's personnel file at this time. Instead, the supervisor keeps a follow-up sheet to record when oral reminders occurred and what the problem was.

"Step II. *Written Reminder* - Again, a private conversation is held with the employee. This time, however, a written record is put in the employee's file including the fact that the problem had been discussed earlier, what had been said and what the employee had committed to. This meeting should also be held in a positive manner. Again, a set plan is developed to correct the problem situation. The plan is included in the letter to the employee.

"Step III. *Final Discussion* - This is the final step of the program. Its purpose is to give the employee an opportunity to think about the future and to determine how the problem will be solved. The employee must come out of this meeting with a firm commitment and plant to solve the problem. If the employee is unwilling to commit or will not agree to the problem, then discharge is the only alternative. Discharge also becomes necessary if the individual fails to live up to the agreed upon

commitments. Like Step II, Step III is totally documented.

"Each step of the program allows for an employee to 'clear his record' with continued good performance.

"a) oral reminders are in effect for three (3) months. If a problem occurs, is corrected, and does not happen again for three months then happens later, you again start at the first step.

"b) Written reminders stay in effect for six (6) months.

"c) Final discussions are in effect for one (1) year.

"Violations of company policy are broken down in three ways: minor, major and maximum:

"a) Minor violations start at Step I of the program. These don't involve honesty, safety or wilful violations. Examples would be unintentional quality problems, early absenteeism problems, misunderstanding policies or things of this nature.

"b) Major violations start at Step II or in some cases Step III. These are a threat to the employee or other employees.

> Wilful misconduct, dishonesty, deliberate acts would fall in this area.
>
> "Maximum violations would result in immediate discharge. These threaten the continuance of the company or the lives and well being of other employees."

Appended to this memorandum was a list of work rules[15] with markings showing whether violations of that rule were of minor, major or maximum seriousness. Among the rules is one noting:

> "Solicitation and/or distribution of literature during work hours or in work areas."
>
> This rule is denoted "minimum."

After setting out this procedure, Taylor went on to say in his March 19, 1985 memorandum the following:

> "Remember, the whole program is a guide. We have no 'set
> punishment.' Every case of alleged misconduct is to be investigated thoroughly. The corrective action to be taken depends on the case, the circumstances surrounding those conditions and the involved individual's past record. Our goal is to correct problems, not to punish people because they occur. Only after a fair evaluation, along with discussions with foremen, managers, and the Employee Rela-

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[15] There is no indication in the record that this list was distributed to employees generally. Taylor testified only that the list was prepared for use in training sessions for leaders and supervisors.

tions Department, should a decision be made as to the proper course of action.

"Also, there may still be a need for a penalty lay-off even though it is not a part of the system. This could occur in the case of an apparent maximum violation where you need time to investigate. For example, an abusive employee who refuses a directive and fails to respond to counseling may need to be sent home immediately with time needed to completely analyze the problem and determine if there is a solution or if discharge is the only alternative.

The attachment to the March 19 memorandum also contained language qualifying the list of rules:

"You should always remember that these are examples and not a complete list of poor behavior. Violations of any of these rules *or acting in any manner that is not conducive to a good working climate can lead to disciplinary action, up to and including discharge.*" (emphasis added)."

This language is certainly not clear, and indeed, it tends to blur the fairly straightforward exposition of a progressive disciplinary procedure and a list of rules and the relative seriousness of transgressions. What is clear is that Taylor was reserving to management[16] the right to determine, subjectively, on a case by case basis, what discipline would be imposed on which employee for what violation.

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[16] Taylor's testimony was consistent with the language of the exceptions to the progressive disciplinary procedure and the relative severity of the rules.

Looking at the application of the disciplinary procedure as outlined here to the parameters off this case[17] there were several instances reported by witnesses both for the General Counsel and the Respondent.

Barbara J. Garner was Plant Engineering Secretary. She testified that she had circulated a memorandum to department managers around March of 1988 soliciting donations for a gift for Gene Arnold, the Plant Engineer, who was leaving. The memorandum was composed, typed and distributed on working time and in the Engineering office, a working area.[18] According to Garner she distributed to eight different department managers without comment before it reached Chuck Taylor. Taylor told Garner that she was violating the no-solicitation rule, and that it shouldn't happen any more or in Taylor's words, she could lose her job.

Dan Arnold, a quality engineer, related that he became interested in local politics after moving to Tupelo in 1985, and in October of 1987, while at work, he asked Paul Smith, and some other managers to his home to meet a candidate for the Mississippi state Senate. Arnold then asked Taylor who replied that this could be construed as solicitation and that the Company "has a no-solicitation rule."

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[17] I limited testimony in the case solely to incidents involving the no-solicitation rule. Both the General Counsel and Respondent objected to this at various times, based on their own priorities, but I shall stand at this point on my original ruling.

[18] Considering the definitions of working area given by Taylor and Bruce Smith, and the configuration of the office area shown on the Company's diagram it is apparent that no solicitation of any kind could take place in that area.

Andy Love, an employee who did not testify here, was apparently campaigning for (or against) the Union in the fall of 1987. Taylor heard of this and testified that he told Love that he, had a right to campaign, but to keep it out of areas of the plant where he should not be campaigning.

Gary Jones, an employee in the tire building department,[19] was given a warning in October of 1987, according to testimony of Chuck Taylor, for violating the no-solicitation rule. Jones himself, testifying two days after Taylor's testimony, was not asked about such warning, or any solicitation which led up to the warning. Taylor, admittedly, did not participate in the incident.

Kathy Swan, another employee who did not testify, was also warned, according to Taylor, because of unverified reports that she was soliciting.

A number of other employees testified that they were warned about sundry violations of the no-solicitation rule. Joel Bailey, a process technician was selling Girl Scout cookies together with a secretary named Faye Mackey. Taylor told Mackey that this was against the no-solicitation rule and that it couldn't be done any more.

In February of 1988, an employee named Ricky Marshall wanted to take up a collection for his sister, who needed a liver transplant. Marshall called Taylor, who expressed sympathy, but told Marshall that such a collection would be against the no-solicitation rule.

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[19] Jones was killed in an accident sometime after he had testified in this proceeding on November 16, 1988. R.I.P.

Alicia McRaney, a first stage tire builder, was taking orders during August or September, 1987 for Christmas decorations from a catalog. She was told by her supervisor, Spike Rice, that this violated the no-solicitation rule.

Cathy Barnett, a Quality Engineering Technician, wanted to collect for a March of Dimes Walkathon. Taylor told her not to do it because it was against the no-solicitation policy.

Philip Walls, a Test Wheel Technician, started a football pool, and had solicited money from people around the plant on working time. His supervisor, Jim Gearhardt told him that it vas against the rule.

In all of the instances[20] brought out in the record here, employees, or in some cases supervisors, were admonished informally that what they were doing or what they had done was in violation of the Company's no-solicitation policy. There were, so far as can be ascertained in the record, no formal meetings, no elaborate discussion of the rule, its interpretation by the company and its application to the employees' activities, and no final warnings that any further violation would result in discharge.[21]

In one instance about which we received a lot of testimony, an employee named Steve Jacobs brought some home-made peanut brittle into the plant and was

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[20] So far as I can determine, all of the alleged violations brought out by the parties here occurred on work time and in work areas.

[21] The closest to this ultimate warning Barbara Garner, as noted above. Garner herself interpreted Taylor's warning as threatening her with discharge if she persisted in violating the rule.

selling it at his machine. He sold the candy to several employees, and offered to sell some to Production Manager Terry Jarzen. Jarzen declined, and advised Jacobs that he was violating the no-solicitation policy. Jacobs said he didn't sell any more candy after that, but he must have been either selling or delivering peanut brittle, because a half-hour after Jarzen told Jacobs to stop, Jarzen returned to his own office and saw that his Secretary had a box of peanut brittle on her desk. Jarzen asked where she got it and she said she bought it from Steve Jacobs. Jarzen then called supervisor Rick Burns and told him to get out to Jacobs' machine to warn him and put a stop to the candy sale during work time in a work area. Burns went out and took the bag containing the peanut brittle into the office until Jacobs could retrieve it after his shift ended.

These instances show consistency with the no-solicitation rule, and also consistency with the Company's asserted grading of violations of this rule as "minor" and punishing initial violations by informal warnings. The Jacobs case goes a little further, showing that even in an instance where a high level supervisor believed that his order to stop selling candy had been ignored, he considered only a warning as appropriate discipline for a continuing violation of the rule.[22]

Turning, then, after consideration of these examples of the Company's implementation of its disciplinary policy on those who violated its no-solicitation rule, to consider the cases of the two employees whose alleged

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[22] A similar situation occurred in the fall of 1988, when Kevin Beeks was selling home-made molasses to employees and supervisors alike, with some discretion, but no limitations, and no warnings, because "it was family." I note that Beeks did not solicit Chuck Taylor to buy any of this ambrosial essence.

violations of the rule led to more severe punishments and to allegations in the Complaint herein of discriminatory and unlawful treatment, I would like to consider first the case of Mitzi Rye.

(b) Application of the Rule to Mitzi Rye

Mitzi Jane Rye was employed at Cooper Tire in Tupelo from February 10, 1986 to June 29, 1988. Her job was that of a first stage tire builder since May 18, 1987.

In September of 1987, Rye and other employees were dissatisfied about working conditions and wanted to "organize." In October, Rye started going to meetings of the Union, the United Rubber Workers, and she became an in-plant organizer for the Union. On October 21, she signed an authorization card for the Union.

Before this, in September, 1987[23] Rye testified that her foreman, Sherman "Sonny" Shelton called her in to his office several times alone, and asked him why she and other employees were upset. She explained that employees had tried to get changes in working conditions, but nothing seemed to change. She told him that the only way the employees had to go was to organize. He replied that they did not need a third party.

On October 23 Shelton came to Rye's machine and told her that she had a meeting with Department Manager Paul Smith and Chuck Taylor in smith's office. She went to the office and met with Smith and Taylor.

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[23] Chuck Taylor testified that he was aware of unspecified union organizers in Tupelo as early as 1985, but he said he knew of a lot of union talk going around by October 1987. See Taylor's account of his conversation with employee Mark Stewart in connection with Rocky Pickering's case.

The latter did all the talking. He told Rye that "they" had been "having meetings" and that her name had "kept coming up" and that he wanted to inform her what Cooper's policy was. He told her that she could not solicit during work time in work areas. Taylor did tell her people had made statements that she was soliciting on Company time, but she replied that "he had been lied to." He told her he was sorry for the misunderstanding, that she had a good work record and good quality, and urged her to keep up the good work. Rye specifically denied that she had been warned that if she violated the no-solicitation she could lose her job.

Taylor stated that he explained the policy in detail, pointing out that solicitation was allowed only "in the cafeteria or the parking lot," and that, in fact, she could lose her job if she violated the rule. Taylor's testimony in this last respect, was corroborated by Paul Smith.

I believe that Taylor probably was more accurate in his memory of the warning given to Rye at this October meeting. Certainly the fact of such a warning is the ostensible basis for Rye's later suspension and discharge. But he may not have been so clear in his formulation of the warning to Rye as he was in his own mind as to what he was about. I also note, even though this October meeting a warning is not alleged in the Complaint as a violation of the Act and I do not find a violation here, that this method of conveying to an employee the nature of the rule and the consequences of its transgression is unique in the experience of others accused of violating the rule up to that time, and menacing in the sense that it involved summoning Rye away from her work to the department manager's office, there to be faced with the Plant Director of Industrial Relations, in a setting which must have been

far from comfortable, and very different from the informal reminders given others who may have sold Girl Scout cookies, or invited co-workers to political meetings.

In view of these circumstances, I find that the Company showed a different focus, method of operation, and a more intense concern over violations of the no-solicitation Rule in cases of union solicitation than it did for other violations of the rule. Thus, there seems to be disparate enforcement of the rule.[24]

After this meeting Mitzi Rye continued working without incident until June 27, 1988.[25] Then Terry Jarzen, who had replaced Paul Smith as manager of the tire assembly department, testified that he had reports that Rye had violated the rule by soliciting on work time and in work areas. On June 27, Rye was ordered to go to Chuck Taylor's office to meet with Jarzen and Tony Miller, a personnel assistant. Jarzen told her that employees had complained to the Company that she was soliciting on Company time and on Company property. She denied that she had solicited on Company time. She asked who were the employees who had complained about her and Jarzen replied that he could not tell her anything at that time. She was suspended and sent home.

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[24] Taylor testified that no warning went into Rye's file as result of the October 23 meeting.

[25] Respondent introduced production figures showing that Rye's production even down after October 1987, and also testimony from her supervisor, Sonny Shelton, that he had warned her against leaving her assignment work area on several occasions. I view this as an attempt to provide post hoc justification for its later actions, since production figures and leaving her work area did not enter in to the Commpany's reasons for Rye's discharge.

At the time of this interview and suspension the Company had received one complaint, from an employee named Dean Johnson, that about a week before, Mitzi Rye had asked him about union meetings. When he said he hadn't thought about it, she took a union card and placed it in his tool box. Later, Johnson testified, a supervisor named Ricky Swords said that he heard that Johnson had been given a card asked him if Rye had given it to him. When Johnson said she had, Swords asked if it was on company time. Johnson responded "Yes, I guess. It was at my machine." Swords then said, "It would have been on company time." Swords then asked if Johnson would be willing to talk to Jarzen about it, and Johnson agreed.[26]

After this conversation Johnson signed a typewritten statement prepared by the Company in which he stated that he was "approached at my machine by Mitzi Rye. She placed an authorization card in my tool box and left it for me to decide if I wanted to sign it. My machine is #14, tire assembly machine. When she approached me I was on work time and in my normal work area. She interfered with my production by talking to me on behalf of the union." In his testimony in this case, Johnson stated that he was not on working time during this incident. Apparently the Company allows a practice by employees, as described by Johnson, of coming in 15 minutes or so early to prepare their tools so that when they do begin working they will be able to begin production immediately. Johnson pointed out that while he starts before his assigned starting time, he stops work before quitting time in order to "let the next

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[26] Swords testified in this proceeding but was not asked about this conversation.

builder get his tools hot. I get out of his way and he begins his machine checks and stuff like that."

Johnson's work station, machine #14, was also Mitzi Rye's work station, and on the day in question, she apparently had stopped working, even though she was still on the clock, and Johnson, who was preparing his tools and taking measurements before his starting time, was not on the clock.[27]

So, as of June 27, when Jarzen called Rye into Taylor's office, he had only the Company produced statement signed by Johnson on which to base his actions.[28] Jarzen told Rye that he had allegations that she had violated the no-solicitation policy during work time and that he was going to suspend her until the Company could investigate the allegations completely.

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[27] It seems to me, from reviewing Johnson's testimony about his conversation with Swords, that he was trying to say that to Swords, but the latter overruled any hesitancy in Johnson's replies to his questions. The typed statement, prepared by the Company elaborates even further by ascribing intentions to Rye that interfered with Johnson. Johnson was not in favor of the Union. He described himself as "offended" that Rye put a card in his tool box, and said that he picked it up, looked at it, then threw it away. I also note that Rye apparently did not cause Johnson to stop his pre-work preparation. He testified that be did it on his own.

[28] I note that in his testimony, Johnson said that the incident between Rye and himself occurred about a week before her suspension. The statement he signed described the incident as taking place between June 2 and June 8. The statement was not signed until June 24. In his memo outlining his presentation to the peer review panel (see discussion, below) Paul Smith, citing Jarzen's records, stated that 'around June 24 of 1988. - - Johnson "approached his foreman and told him that "- - Rye had approached him about the Union. Johnson volunteered to and did signed a statement about the incident. Jarzen apparently did not talk to Johnson about the statement, and there is no evidence that there was any discussion between Jarzen and Taylor or other officials. I find it hard to believe that there were no discussions between Jarzen and other officials before the suspension, but I have no evidence to support these feelings.

Neither in the meeting, nor in his past-meeting memorandum to the file, did Jarzen mention that he asked Rye for her side of the story.

Taylor was made aware of the suspension, and he began an investigation of the allegations in a memorandum dated June 27 and addressed to several supervisors. The tone of the investigation was set in the first paragraph of a statement and a list of questions which each supervisor was to ask employees under his supervision:

> "As you are probably aware, Mitzi Rye has been suspended for violating Coopers "no-solicitation policy. Apparently, she has solicited for any or distributed materials for an outside organization on work time and in work areas. Since she had previously been warned concerning this, it seems clear that she willfully and intentionally violated this policy."[29]

Having pronounced Rye guilty as charged, the memorandum went on to say:

> "In order to insure that she is being treated fairly, Cooper is making a full investigation into this before any final decision is made concerning her future employment. As such I need to ask you a couple of questions. The purposes of these questions is to find out the degree to which Mitzi violated our no-solicitation policy,

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[29] It seems clear to me, on the basis of this paragraph, that the question of Rye's quilt or innocence had already been decided, and that the "investigation" to be conducted was merely to gather additional documentation to be used in a show trial in some form or other.

> not to find out if you agreed or disagreed with what she may have been soliciting you about."

After this introduction, the supervisors were to ask a series of questions, starting with an inquiry as to whether the individual employee was aware of the "no-solicitation" policy. If he was not, then the supervisor was to point out that the policy was contained in the employee handbook, and the employee should read it and refresh his memory. A short summary was included in the memorandum for the supervisors to use. In addition, the following questions were to be asked:

> "Has Mitzi ever asked you, during work time and in a work area, to sign an authorization card or attend meetings for any organization? to contribute money on behalf of any organization?"
>
> "Are you aware of any cases where she has handed out printed materials during work time in the work area."
> "Are you aware of any other employees who have violated the "no solicitation/no distribution" policy."

and concluded:

> "If you ever have any questions concerning whether or not an activity is in violation of this policy, simply ask me or your employee relations representative."

The supervisors named in this memorandum moved about the plant and asked numbers of employees the prescribed questions. The effect of this, and its legality

will be discussed below in Section III. D. 6. of this deicision, but for our purposes here I will just note that by June 29, two days after the memorandum was dated, Rye was called in from her suspension to a meeting at the plant.

She testified that when she got to the plant she met with Miller, Jarzen and Taylor. Taylor did all the talking, beginning by telling Rye that they had investigated the allegations against her and asking her whether she had solicited on Company time and property. She admitted that she had solicited on the property, but never on Company time. Taylor then told her that they had five employees statements stating that she had solicited on Company time.[30] He then told her that they felt that the Company didn't trust her anymore and they were going to have to dismiss her for "gross insubordination" for soliciting. Rye asked if she could see the statements against her, but Taylor replied "no, not at this time."[31]

Testifying about this meeting, Taylor stated that the investigation revealed that Rye had committed numerous violations in work areas and on the work time of herself and others. He then said that at the June 29 meeting he went in "with what I think is an open mind, but decided in the meeting that "she sat there and lied to me." Taylor felt that Rye was evasive because she would not admit that she had solicited on working time.

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[30] I cannot tell whether Taylor was referring to written or oral statements. Of the five written statements submitted in evidence here; one Johnson's, was dated June 24, two others, Kenny Dowdy's and Randy Spencer's, were dated June 28, and the final two, David McVay's and Terry Jones', were not dated until July 1.

[31] There is no substantial dispute between Rye's version of this meeting, and notes transcribed by Miller and introduced in evidence here.

She was not being straightforward and honest with him.[32] Rye failed to demonstrate true contrition or a firm purpose of ammendment leading Taylor to conclude that she would continue to violate the policy and disrupt production;[33] that he could come up with no positive solution, no way to solve the problem;[34] "so the only alternative was to recommend discharge. Rye was notified of this decision, and she left.

At this point the Company's decision had been made by Taylor. As he testified, he had the authority to recommend discharge to the Plant Manager, and ordinarily, as in this case, it was followed. The Company has maintained throughout that Rye was discharged not only for repeated violations of the no-solicitation rule, but for gross insubordination for violating a direct order not to violate the rule. The General Counsel contends that, not only is the rule invalid, but that the discharge of Rye based on that rule was discriminatory. As noted above, I agree with the contention that this rule is invalid. I have also found that the enforcement of the rule against union solicitation vis-a-vis other kinds of solicitation, was disparate and uneven.

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[32] Taylor was comparing her testimony not only with the available written statements, but with "numerous other statements from people who wished not to have their names used." I cannot rely on such ephemeral and unsubstantiated opinions to base findings here, and furthermore, Taylor's claim that he went into the June 29 meeting with an open mind is at variance with his June 27 memorandum to the supervisors. This latter fact leaves me with serious doubt as to Taylor's objectivity and credibility in regard to any critical areas in this case.

[33] There is no evidence in this case that Rye' activities ever disrupted production.

[34] There is no evidence that Taylor made any proposal, or tried in any way to come up with any kind of solution, including following the steps of the Company's stated progressive discipline procedure.

Looking, then, at Rye's discharge, I find that such action by the Company, based upon an invalid rule, violates Section 8(a) (1) and (3) of the Act; *Harolds Club*, 267 NLRB 1167 (1983) enf. 758 F.2d 1320 (CA 9, 1985); *Stoddard-Quirk Mfg. Co., Inc.*, 138 NLRB 615 (1962) *Albertsons, Inc. - Southco Division*, 289 NLRB No. 39, (1988).

But even if this rule were valid insofar as it may have prohibited solicitation on work time, any analysis of the facts upon which Rye's discharge was based would show that the Company jumped to conclusions which were unwarranted by these facts, thereby supporting the inference that the discharge was a pretext to retaliate against Rye for her union activity, and to warn others lest they suffer the same fate.

Taking the situation from the beginning, it is clear from the undenied testimony of Dean Johnson that the question of whether Mitzi gave him a card on work time is somewhat equivocal. He was not on work time. That is clear. But she was, in his words, finished working and standing aside to alow him to carry out his preparation for beginning work. Johnson's testimony also reveals that the Company was wrong in its conclusion that he, Johnson, had voluntarily approached Company supervisors to complain about Rye's solicitations. In fact Supervisor Swords approached him, and by putting words in his mouth, turned what might have been an innocuous exchange between Johnson and Rye into a violation of the rule. The Company then jumped again in its preparation of the written statement for Johnson to sign, putting more words into Rye's mouth then Johnson had reported to Swords or, under oath, to us at this hearing. At this point, Jarzen took over. He

had only Johnson's statement[35] when he went into the June 27 meeting with Rye, and so far as the record reveals, he did no independent investigation. He never contacted Johnson to find out the truth, falsity, or exaggeration contained in Johnson's statement.

Taylor took the next jump, when he issued his memorandum of June 27, announcing Rye's quilt and soliciting his supervisors to talk to all "their people" and tell them about Rye's situation, as well as ask for more information. In spite of Taylor's protestations of open-mindedness it is clear that he was convinced of Rye's quilt -- still - as of June 27 -- based only on the Johnson statement. By June 29, Taylor had two other statements, from Dowdy and Spencer, but there is no evidence that at that time Taylor conducted even the must superficial investigation to determine the truth or falsity or exaggeration of these statements, or Johnson's statement.

Rye's fate was sealed, as this brief recital shows, as soon as Swords got Johnson to say that Rye had placed the card in his tool box. From these facts I think the inference can be made that the Company had determined to make an example out of Rye. I find, therefore, that Rye had ***not violated the rule, that the Company did not investigate the alleged violation of the rule before suspending and then discharging her, that if the Company had investigated Johnson's statement they would have found it to be exaggerated and inaccurate, in fact not produced by Johnson but by some Company functionary, and finally, that the punishment for alleged insubordination was unwarranted in view of Rye's

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[35] I disregard any intimations of vague, unsubstantiated complaints from unidentified sources.

credible testimony that she had never been warned on October 23, 1987 that she would be discharged if she violated the rule again.[36] In determining to make an example out of Rye, I would find, if it were necessary to this decision, that the Company violated Section 8(a)(1) and (3) of the Act.

In arriving at my findings and conclusions concerning the discharge of Mitzi Rye, I have not considered the composition, the convening, the functioning, or the decision of the peer review panel. Briefly, the Company has a procedure whereby, after discipline has been administered, an aggrieved employee may request a review before a panel, or committee, composed of two members of management and three rank and file employees (peers). In this case Rye requested and was granted such a review. A panel was appointed, they held a hearing, and subsequently voted, unanimously, to affirm the Company's decision to discharge Rye.

I have not considered this aspect of the case in my decision because I consider the whole peer review process as extraneous to the Company decisions which are the subject matters of the Complaint here. My decision is based on the Complaint and upon the evidence adduced by the parties dealing with the allegations in the Complaint. If I find, as I have here, that the Company's actions are violative of provisions of the Act, as alleged in the Complaint, the actions of the peer review panel can have no effect on that, although if the panel had reversed the Company action, and ordered Rye reinstated, or whatever their order might be, that would go to the question of the remedy recom-

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[36] Even if she had been so warned, there is no evidence here that anyone ever gave her a direct order not to violate the rule.

mended here. The panel, which, after all, is a creature of the Company and has no legal or contractual basis or function, did not reverse the Company's decision, so the panel's actions are immaterial to the issues in this case.

C. Application of the Rule to Rocky Pickering

Rocky F. Pickering had been employed by Pennsylvania Tire, the unionized company which had occupied the buildings which were purchased by Cooper, and reopened for the manufacture of tires in December, 1984. After leaving Pennsylvania in 1978, Pickering worked as a self-employed carpenter, building houses.

Pickering is a member of a Masonic lodge in Verona, Mississippi, just south of Tupelo. There he became friendly with Mark Stewart, a second stage tire builder at Cooper since September or October, 1985. In the course of their conversations Stewart showed Pickering some paychecks he received from Cooper Tire. Stewart said the money was good and he enjoyed working at Cooper. Pickering was impressed, and asked Stewart if he would do what he could to get Pickering hired at the Company. Stewart agreed, and he then spoke to Chuck Taylor, as well as Candy Taylor[37] and Jesse Meeks, in the personnel department. Pickering then filed an application and was hired in July, 1987.

His job was servicing tire builders. He drove a vehicle called a "tugger," a stand-up electric machine used to haul materials to tire builders as needed. In the course of his job he was principally assigned to the tire

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[37] The record does not reveal Candy Taylor's relationship, if any, to Chuck Taylor.

assembly departments, but he had to leave those departments from time to time in order to get materials.

After he began work at Cooper, Pickering became involved with the Union. He signed an authorization card on October 21, 1987, talked to people about the Union in the break room or the parking lot, and he was a member of the in-plant organizing committee. Indeed, after he had been employed by the Company for about three weeks, Pickering refused an offer by his supervisor, Jimmy Greene, to become a tire builder. Pickering told Greene that he did not want to do that at the time because "we're not union yet."

Stewart found out from some other employees that Pickering was supporting the Union. He was, in his own words, "shocked, surprised and angry." He felt that Cooper was a good company; that they didn't need a union; and that Pickering had abused his, Stewart's, good offices to get into the Company and then push for the Union. More importantliy, perhaps, Stewart was also concerned that his recommendation of Pickering would prevent his moving up in the Company.

In early or mid-November, 1987, Stewart stopped Pickering to talk.[38] Pickering had finished work and was on his way out of the plant. Stewart was still at his work station. They exchanged some information about the Masonic lodge and then Stewart asked what it was he had heard about Pickering pushing for the Union. Pickering replied that he was, and began giving Stewart the reasons why he thought it was "essential that

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[38] Stewart testified about this, but placed the date as sometime in 1986 later changing this to 1987. His memory on dates and time was poor. On most details of the meeting the testimony of Pickering and Stewart is in agreement.

Cooper Tire be represented by the Union." They talked about insurance, job security and other topics. Both Pickering and Stewart agreed that they talked for 45 minutes or so, and that their conversation was observed by second stage supervisor Mike Taylor.[39]

On one important issue there is a difference between the testimony of the two participants in the meeting. Pickering said that during the meeting he asked Stewart if he would get in trouble for talking with him for so long. Stewart replied that he was not going to get into trouble because "they know what I'm doing." Stewart denied that Pickering said anything to him about getting in trouble for talking to him for so long, and he denied that anyone from the Company had told him that he should go and talk to Pickering.

To clarify this credibility question it is necessary to set out two sequels to the conversation between Pickering and Stewart. First, Stewart testified that after he had talked to Pickering he told his supervisor, Mike Taylor, his foreman, Lawrence Dangerfield, and then went to the personnel office and told Chuck Taylor. Stewart had made a list of the subjects he had discussed with Pickering and went over the list with these three individuals. In going over the list with Chuck Taylor, Stewart asked him what he could do for the Company without breaking any rules or getting in trouble. Taylor replied that he could not tell him what he could do; that he could not ask him to do anything for the Copmany, but Stewart could talk to Pickering, express his opinions, and tell Pickering that he was going to "get in trouble eventually if be keeps soliciting the union on

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[39] There is no indication in the record that this Taylor has any connection to Chuck Taylor.

company time."[40] Taylor went on to explain the Company's position on each of the points which Pickering had brought up.

In his testimony on the meeting with Stewart, Taylor stated that Stewart came to his office to talk about "several things," that he had heard from "numerous people"[41] that things were being said as to what employees "would do or wouldn't do or didn't do." Stewart expressed his anti-union sentiments but Taylor, as in Stewart's report of this meeting, told him the Company could not tell him he could do this or that, but he could express his opinions and his ideas, and make sure that his friend Pickering understood the no-solicitation policy "and that he didn't do anything to violate that in his work to try to get a union in." Taylor specifically denied that he was aware that Stewart had talked to Pickering for 45 minutes on company time before he came to Taylor's office, or that he had talked to Pickering for any length of time while on company time.

Second, I note Pickering's testimony during a conversation with Taylor on February 23, 1988, between the time of his suspension early in the morning of the 21st, and a formal meeting with Taylor and other Company officials on the 24th. During this talk Pickering explained what he had done, and Taylor asked him "Well, didn't Mark Stewart talk to you?" - - - "We sent him to talk to you about your union activi-

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[40] In November, when this conversation took place, there is no indication in this record that Pickering had talked to anyone about the Union on Company time except for the incident with Stewart and the prior short statement to supervisor Jimmy Green.

[41] Including Rocky Pickering.

ties." When Pickering admitted that he had talked with Stewart for "45 minutes one night in the aisle," Taylor asked "didn't he warn you that you were going to get in trouble about your union activities?"

Looking at this situation, I find that Stewart was generally a credible witness, although I do not credit his denial that someone from management, probably Chuck Taylor, requested, or at least sanctioned, the conversation with Pickering in November.

The Company certainly must have been aware of Pickering's Union activities by that time. Pickering made no secret of his sympathies. He had spoken Green about a Union in the plant. He was on the in-plant organizing committee[42] and had been talking Union in the break room and the parking lot.

Stewart made it clear that he was embarrassed about Pickering's activity, viewing this conduct as a betrayal of the effort Stewart had made to get him a job. If Stewart was concerned about his job because of his connection with Pickering, he would certainly be concerned about conducting a 45 minute conversation with this Union supporter, while he, himself, was on the clock, and under the observation of his supervisor.[43] I just cannot believe that this employee, Stewart, a loyal and ambitious individual would have put himself in the position of carrying on this conversation with Pickering unless it was, if not requested, at least approved by the Company. I, therefore, credit Pickering's

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[42] Although there is no evidence that the union had sent a list of organizing committee members to the Company, as is frequently done.

[43] A supervisor, moreover, who made no effort to halt the conversation, or suggest that Stewart get back to work.

testimony that Stewart said to him during the conversation that he was not worried because "they" knew about it.

Chuck Taylor's testimony on this subject is rather fragmentary. Early in the hearing, while being examined by the General Counsel under Rule 611(c), Taylor remembered a conversation with Stewart in October of 1987. Taylor did not recall that Stewart told him that he had contacted Pickering, but Taylor did say that Stewart asked him what he could do about the fact that Pickering was encouraging union membership. Stewart did not say that he had talked to Pickering, but asked what he should do. Taylor never did say what he told Stewart in this conversation, but from the date of the conversation and the difference between Taylor's description of this conversation, and the conversation which both Stewart and Taylor agreed took place after Stewart's talk with Pickering, it is fair to say that there were two conversations between Taylor and Stewart. The first sometime in October, and the second, after the 45 minute conversation between Stewart and Pickering. Neither Stewart nor Pickering indicated that during their November conversation Stewart warned Pickering to watch out for his union activities. Stewart testified that in his meeting with Chuck Taylor after that November conversation, Taylor told him he should warn Pickering about violating Company rules. Stewart further testified that, after that, he had a second, short, meeting with Pickering in which he did warn him about soliciting.

I think the inference is warranted, and I find, that there was a first meeting in October between Taylor and Stewart during which Taylor authorized or instructed Stewart to talk to Pickering, and to find out what his

problems were. Following this meeting, Stewart saw Taylor again, and went over Pickering's grievances[44] at which time Taylor did tell Stewart to warn Pickering against violating the rule. Stewart testified that, indeed, he did warn Pickering after this second meeting with Taylor.

On February 21 Pickering was suspended for passing out literature on working time and in a working area. There is little dispute about the facts of this incident. Pickering was working the midnight shift, and about 11:30 p.m. on the night of February 20 he stopped his tugger in an aisle to talk to another tugger operator, Jerry Riddle, in order to tell him to get some materials to supply the tire builders. During this conversation Pickering asked Riddle if he had seen a newspaper clipping from a Texarkana, Arkansas, newspaper about employees of Cooper there receiving a cost of living pay increase.[45] Pickering reached into his pocket and pulled out a copy of the clipping. Just at that time supervisor Jimmy Greene came up. Pickering showed the clipping to Greene and asked if he had seen it. Greene replied that he had, and walked on. Pickering then gave the clipping to Riddle, and went back to work.

Greene reported the incident to foreman Spike Rice. Rice in turn reported to head shift foreman Jim Fitzgerald. At 2:55 a.m. (by this time it was Febraury 21),

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[44] This is consistent with Stewart's testimony. I find Taylor's denial that Stewart told him that he had met with Pickering to be disingenuous and untrue, further eroding Taylor's credibility.

[45] This clipping had been reproduced as part of the Union's organizing effort at Tupelo. There were, apparently, many copies around the plant, in the rest rooms, the break room, and other places.

Pickering was called to Fitzgerald's office. He was asked if he had handed the clipping to Riddle on Company time. He said that he had, and Fitzgerald said he had no alternative then to send him home, and when, or if, he came back, it would have to be through Chuck Taylor's office.

Greene was assigned to escort Pickering out of the building. On the way, according to Pickering, he asked Greene how long they had "been looking to get me for something." Greene replied "about three months." Then Greene asked Pickering why he thought Cooper needed a union. Pickering replied, that instances like the present one and other things, showed the need for a Union.

On Monday morning Pickering called Taylor. Later Taylor called him back and said they had decided to leave the matter "up to the lawyers." I have already described the meeting between Pickering and Taylor on Tuesday the 23rd. Then on the 24th there was a formal meeting. At this meeting the Company was represented by Plant Manager Dannemiller, Jarzen, Candy Taylor and Chuck Taylor. There was some conversation between members of this group and Pickering about the Texarkana cost of living adjustment, profit sharing at Tupelo, complaints by individual employees, a disavowal of employee contractual status required to be signed by employees to avoid "at-well" employment-type litigation and other matters. Chuck Taylor then told Pickering he could return to work that Saturday on the 3:00 to 11:00 shift, and that he could count the time off as a suspension.

Since I have found the Company's no-solicitation rule to be invalid.[46] I find that its enforcement against Pickering in this instance is unlawful. accordingly, I find that the Company has violated Section 8(a)(1) and (3) by suspending Pickering for three days in February, 1988. *Albertsons Inc., supra.*

But, as in Rye's situation, if the rule may be considered valid as to solicitations on working time, I, nevertheless, would find Pickerings suspension to be discriminatory and violative of Section 8(a)(1) and (3). As I have found, the Company knew or should have known of Pickering's Union activity because of his conversation with his supervisor, Jimmy Greene in the late summer of 1987, or at the latest, when Mark Stewart reported on Pickering's activities to Chuck Taylor in October of 1987. I have found, further, that Taylor, or someone in management, sent Stewart to find out what Pickering's grievances were. Stewart did so find out in the 45 minute conversation with Pickering in November. Stewart then reported these findings back to Taylor, who, in turn, told Stewart to warn Pickering against violations of the no-solicitation rule. Stewart did that, too.

Then, in February, 1988, Pickering was caught distributing literature, the Texarkana newspaper clipping, on company time in a work area. Instead of a warning, or an admonition to stop, as all other examples cited in this case show, Pickering was called into Jim Fitzgerald's office and summarily sent home.[47] Not

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[46] See section III B, above.

[47] I can understand Fitzgerald's problem in getting any advice as to how to proceed, at 3:00 o'clock on a Sunday morning, but his actions were ratified by the Company, and the suspension was allowed to stand.

only was he sent home, but he was escorted out of the plant by supervisor Greene, during the course of which Greene admitted that they, the Company, had been trying to "get" Pickering for something for three months, back to the time of the Pickering - Stewart conversation in Stewart's work area.

All of this leads me, inescapably, to the conclusion first that the Company was lying in wait for Pickering to break a rule, based on his advocacy of the Union, and second that this suspension, in view of all the other evidence as to discipline for violations of the no-solicitation rule up to that time, show that discipline was applied in a discriminatory manner. In the absence of any reason offered by the Company why the discipline was so applied, I find that the reason was Pickering's Union activity.

These are the reasons which would impel a finding of violations of Section 8(a) (1) and (3) in Pickering's suspension.

D. *Additional Allegations of Unfair Labor Practice*[48]

1. Jimmy Greene

The General Counsel alleges that Greene's admission to Pickering while escorting him out of the plant on the morning of February 21, 1988, that the Company

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[48] All of the allegations in this Complaint arise out of and are connected with an organizing campaign being conducted from about October, 1987 to December 1, 1988. The parties stipulated that a petition was filed by the Union on October 13, 1988, and an election was held by the 26th Region on November 29 and 30 and December 1, 1988. Respondent's argument that I should dismiss these independent 8(a)(1) allegations is without merit; *Redd I, Inc.*, 290 NLRB No. 140 (Sept. 16, 1988); *Davis Electrical Constructors, Inc.*, 291 NLRB No 17 (Sept. 30, 1988).

was waiting to "get" Pickering is an independent violation of Section 8(a)(1). I agree. I credit Pickering, who I found to be a candid and credible witness, and I do not credit Greene's denial that he made the statement, and I find that Greene's statement violated Section 8(a)(1) of the Act. *Storer Communications of Jefferson County, Inc.*, 279 NLRB 1081 (1986).

2. Candy Taylor

Candy Taylor was described in the Complaint as Office and Traffic manager, and by several witnesses in this case as Assistant Personnel Manager. Whatever her title or position, the independent evidence shows, and I find that she was a supervisor and agent of the Respondent during all times material here.

Gary Jones testified that he had a conversation with Candy Taylor during the last part of 1987, or the first part of 1988. At that time Taylor came up to Jones' machine while he was working and said that rumors were going around about the Union, and that his name kept coming up. Jones expressed surprise, and Taylor said yes, and that she wanted to talk to him and tell him that he had better know what he could do and couldn't do, and to be careful because - - could look bad on his record. Taylor did not testify in this proceeding. I find that Jones' statements were candid and truthful and I credit his testimony. However, he was an avowed Union supporter and a member of the in-plant organizing committee. Therefore, I feel that Taylor's identification of him as being a Union supporter would come within conduct permitted Respondent under *Rossmore House*, 269 NLRB 1176 (1984). Her implied threat of unspecified retaliation if he continue his union activities, however, went beyond *Rossmore*, and constitutes a

violation of Section 8(a)(1) of the Act; *Purolator Products, Inc.*, 270 NLRB 694 (1984); *Storer Communications of Jefferson City, supra.*

3. Michael Hawkins

Jones also testified that a week or so before his conversation with Candy Taylor he was working and he was approached by a supervisor from another area named Mike Hawkins. Hawkins asked Jones how the union meetings were going. Jones said that he didn't know. Hawkins then asked Jones for "some union cards and stuff." Jones replied that he couldn't talk to Hawkins about the union "or anything" because it was against the law while he was working. Hawkins did not testify.

I find that in this situation, these questions to an open and active adherent of the union are not violative of the Act.[49] *Rossmore House, supra*

4. Chuck Taylor

(a) February 23, 1988: I do not believe that the conversation between Taylor and Rocky Pickering on February 23 created the impression of surveillance of Pickering's or others' union activities; nor was there any solicitation of employees to solicit other employees to abandon the union.[50] So far as I can determine from this record Taylor never solicited Pickering as a mission-

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[49] ???????????

[50] If that ever occurred at the Company, it happened in a meeting between Taylor and Mark Stewart which I have inferred and found took place sometime in October. That incident is not alleged in the Complaint as a violation of law.

ary from the Company to other employees. I do not find any threats by Taylor at this meeting.

5. February 24, 1988. At this meeting there was considerable discussion about cost of living, other benefits and at-will employment clauses. Moreover, I cannot find that Taylor, or any of the other supervisors who attended this meeting with Pickering actually solicited grievances nor is there any indication that the Company offered to discuss or to remedy these grievances.

6. Lawrence Dangerfield, Sonny Shelton and Spike Rice.

The parties stipulated that "between the time of Ms. Rye's suspension and her discharge, during the course of the Company's investigation that -- Dangerfield, Rice and Shelton read to a number of employees five paragraphs that are contained in General Counsel's Exhibit 8. - - -.[51]

These inquiries, made to more than 150 employees individually by these supervisors were not accompanied by any assurances that they need not answer, and no retaliation would be taken against them. I find in these circumstances that these interrogations of employees violated Section 8(a) (1) of the Act. *Johnnies Poultry Co.*, 146 NLRB 770 (1964); *Bill Scott Oldsmobile*, 282 NLRB No. 140 (1987).

IV. The Remedy

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act. I shall recommend that it cease and desist therefrom, and take certain affirmative

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[51] See section III(C) (2) (b), above for the five paragraphs cited here.

action designed to effectuate the policies of the Act.

I shall recommend that Respondent pay to Rocky Pickering an amount equal to the wages he lost because of the discrimination against him together with interest thereon, and any reference to his suspension shall be expunged from Respondent's files. I shall also order that Mitzi Rye be immediately offered reinstatement to her former position, and if that job no longer exists, to a substantially equivalent position, together with all rights and seniority, and that she be made whole for wages lost as a result of the discrimination against her with interest thereon to be computed in the manner described in *F.W. Woolworth Co.*, 90 NLRB 289 (1950); *New Horizons for the Retarded, Inc.*, 283 NLRB No. 181 (1987).[52]

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by suspending Rocky Pickering.

4. Respondent violated Section 8(a)(1) and (3) of the Act by discharging Mitzi Rye.

5. Respondent violated Section 8(a)(1) of the Act by maintaining an unlawful no-solicitation rule, by threat-

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[52] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ening its employees, giving them the impression that their legitimate activities were under surveillance, and by interrogating them without proper safe guards.

6. The unfair labor practices set forth above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law and pursuant to Section 10 (e) of the Act. I hereby issue the following, recommended.[53]

ORDER

The Respondent, its officers, agents, successors and assigns, shall:

1. Cease and desist from

(a) Maintaining and giving effect to the no-solicitation rule contained in its employee handbook in effect during 1987, 1988 and 1989.

(b) Suspending, discharging or otherwise disciplining its employees for alleged violations of that no-solicitation rule.

(c) Creating the impression that its employees' union activities are under surveillance.

(d) Threatening employees with reprisals because of their union activity.

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[53] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommendations Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Interrogating its employees about their own or others' union activity without first having given these employees proper safe guards against retaliation or discrimination.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make Rocky Pickering whole for wages lost by him due to his suspension on February 21, 1988 together with interest, and remove from his file all record of that suspension.

(b) Offer Mitzi Rye immediate and full reinstatement to her former job, or a substantially equivalent position without prejudice to her seniority or other rights and privileges previously employed; and pay to her any wages lost by her by reason of the discrimination against her in the manner set forth in section IV, "The Remedy," above.

(c) Preserve and, on request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Tupelo, Mississippi, copies of the attached notice marked "Appendix."[54] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, DC August 31, 1989

George F. McInery
Administrative Law Judge

[54] If this Order is enforced by a Judgement of the United States Court of Appeals, the words in the notice reading- "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United Sates Government

AFTER A TRIAL AT WHICH ALL PARTIES WERE AFFORDED THE OPPORTUNITY TO PRESENT EVIDENCE, IT HAS BEEN FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT IN CERTAIN RESPECTS AND WE HAVE BEEN ORDERED TO POST THIS NOTICE AND TO CARRY OUT ITS TERMS.

WE WILL NOT maintain a discriminatory no-solicitation rule.

WE WILL NOT threaten employees with reprisals because they engage in union activities.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT interrogate our employees without first giving them proper safeguards against retaliation.

WE WILL NOT discharge, suspend or otherwise discipline our employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our records any references to the suspension of Rocky Pickering and WE WILL pay Rocky Pickering the wages he lost on account of that suspension, with interest.

WE WILL offer Mitzi Rye immediate and full reinstatement to her former job or a substantially equivalent position, together with all her seniority and other rights and privileges, and WE WILL make her whole for any lost of wages she may have suffered by reason of the discrimination against her, with interest.

COOPER TIRE AND RUBBER CO.
(Employer)

Dated _____

By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, P.O. Box 41559, Memphis, TN 38174-1559, Telephone No. 901-222-2687.

STATUTES INVOLVED

29 U.S.C. §157 Rights of Employees. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)[29 USC §158(a)(3).

29 U.S.C. §158(a)(1), (a)(3) Unfair Labor Practices By Employer. It shall be an unfair labor practice for an employer --

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7[29 USC §157];
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action

defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 USCS §159(a)], in the appropriate collective bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [29 USCS §159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. §160(a) Powers of Board Generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [29 USCS §158]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [29 USCS §§151-158, 159-169] or has received a construction inconsistent therewith.

29 U.S.C. §160(c) Reduction of Testimony to Writing; Findings and Orders of Board. The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or

without back pay, as will effectuate the policies of this Act [29 USCS §§151-158, 159-169]: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [29 USCS §158(a)(1) or (2)], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before or examiner or examiners [administrative law judge or judges] thereof, such member. or such examiner or examiners [judge or judges], as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no such exceptions are filed within twenty days after service thereof upon such

parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

29 U.S.C. §160(e) Petition to Court for Enforcement of Order; Proceedings; Review of Judgment. The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, nd to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall show to the satisfaction of the court that such additional evidence is material and

that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or may new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

29 U.S.C. §160(f) Review of Final Order of Board on Petition to Court. Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the

court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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No. 92-338

In the Supreme Court of the United States

OCTOBER TERM, 1992

COOPER TIRE & RUBBER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that petitioner discharged an employee in retaliation for engaging in solicitation on behalf of a union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 957 F.2d 1245. The decision and order of the National Labor Relations Board (Board) (Pet. App. A43-A50), including the decision and recommended order of the administrative law judge (ALJ) (Pet. App. A51-A110), is reported at 299 N.L.R.B. No. 145.

JURISDICTION

The decision of the court of appeals was issued on April 8, 1992. An amended judgment was entered on

June 1, 1992. Pet. App. A28-A29. A petition for rehearing was denied on July 8, 1992. Pet. App. A41-A42. The petition for a writ of certiorari was filed on August 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Cooper Tire & Rubber Company operates a tire manufacturing plant in Tupelo, Mississippi, that produces tires 24 hours per day, seven days per week. Pet. App. A3. Approximately 685 employees work at the Tupelo plant. *Ibid.* During their shifts, petitioner's employees receive a scheduled 20-minute paid lunch break, and they are also permitted shorter informal smoking breaks and breaks to use the restroom and water fountains as needed. *Ibid.* There is considerable open space between some sections of the production floor and the break areas of the plant. *Id.* at A62. For example, the farthest-situated tire-building machine is 600 feet from the break room. *Id.* at A61-A62. However, with the exception of the break room and locker rooms, petitioner treats the entire plant as a work area. *Id.* at A5.

Petitioner maintained a "no-solicitation" rule at Tupelo. The rule states (Pet. App. A5):

> No Cooper employee should be permitted to distribute any printed matter or solicit on behalf of any group or organization during working time or in any working areas.
>
> Solicitations or distributions of printed matter by Cooper employees will be permitted only during non-working time and in non-working areas.

On June 29, 1988, petitioner discharged Mitzi Rye for allegedly violating the no-solicitation rule. *Id.* at A80. Rye, who worked in the tire-building department, was the first and only employee terminated by petitioner in connection with the company's no-solicitation policy. *Id.* at A14. The facts relating to Rye's discharge are as follows:

In September 1987, Rye and other employees had become dissatisfied with working conditions at the Tupelo plant and wanted to organize. Pet. App. A80. In October 1987, Rye began attending meetings of the United Rubber, Cork, Linoleum, and Plastic Workers of America, AFL-CIO (the Union). She became an in-plant organizer and signed an authorization card for the Union on October 21. *Ibid.* Two days later, on October 23, Rye was summoned from the production floor by her foreman for a meeting with Paul Smith, manager of the tire-building department, and Chuck Taylor, the director of industrial relations. *Id.* at A80-A81. Taylor told Rye that "they" had been "having meetings" and that Rye's name "kept coming up" as someone who was soliciting on company time. *Id.* at A81. Rye replied that Taylor "had been lied to." *Ibid.* Taylor apologized for the "misunderstanding," and informed Rye that solicitation was allowed only "in the cafeteria or the parking lot." *Ibid.*

After the October meeting with Smith and Taylor, Rye worked without incident until June 27, 1988. That day, Rye was ordered to report to Taylor's office to meet with Terry Jarzen, who had replaced Smith as manager of the tire-building department. Pet. App. A82. Jarzen told Rye that the company had received complaints that she was soliciting on company time

and on company property. Although Rye denied that she had solicited on company time, Jarzen suspended her from work and sent her home. *Ibid.* The same day, Taylor launched a "full investigation" into Rye's conduct by distributing a memorandum listing a series of questions to be asked employees concerning "the degree to which Mitzi violated our no-solicitation policy." *Id.* at A85. Between June 27 and June 29, four supervisors moved through the tire-building department and asked more than 150 employees the prescribed questions. *Id.* at A25. Among the questions was: "Has Mitzi ever asked you, during work time and in a work area, to sign an authorization card or attend meetings for any organization?" *Id.* at A86.

On June 29, Rye was called in from her suspension to meet with Taylor and Jarzen. Taylor informed Rye of petitioner's investigation and asked her whether she had solicited on company time and property. Pet. App. A87. Rye admitted that she had solicited on company property, but never on company time. *Ibid.* Taylor replied that five employees had given statements that she had solicited on company time, but he refused her request to see the statements. *Ibid.* Taylor then recommended Rye's discharge, and the plant manager accepted his recommendation. *Id.* at A88.[1]

---

[1] Petitioner also disciplined employee Rocky Pickering by suspending him for three days for violating the no-solicitation rule. Pet. App. A99-A100. The court of appeals affirmed the Board's order to make Pickering whole for any loss of earnings and benefits resulting from his suspension, finding that the discipline was in retaliation for his union activities. *Id.* at A46,

2. The Union filed an unfair labor practice charge alleging, *inter alia*, that petitioner's no-solicitation rule was unlawful under Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). The Union further alleged that petitioner's discharge of Rye violated Section 8(a)(3) and (1) of the Act,[2] and that the interviews conducted by petitioner's supervisors during its investigation of Rye's activities violated Section 8(a)(1). The Board's General Counsel issued a complaint and, after a hearing, the ALJ determined that petitioner's no-solicitation rule was overly broad under Section 8(a)(1) because it prohibited solicitation in non-working sections of the plant such as restrooms and smoking areas, and, additionally, because it prohibited solicitation in those non-working areas "used by employees on their non-working time as [*sic*] their way to the break room, smoking area, restrooms, water fountains or in and out of the plant." Pet. App. A63-A64. The ALJ found that petitioner had failed to demonstrate any substantial business or economic justification for banning solicitation in these areas. *Ibid.*

A16. Petitioner does not challenge the court's holding as to Pickering in its petition to this Court.

[2] Section 8(a)(3), 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

The ALJ further ruled that the Rye discharge violated Section 8(a)(3) and (1) because it was based upon enforcement by petitioner of an invalid no-solicitation rule.[3] Pet. App. A89. The ALJ also determined that the discipline petitioner imposed on Rye violated Section 8(a)(3) and (1) for two additional reasons. First, the ALJ found that petitioner enforced its no-solicitation rule disparately against union solicitation, permitting other kinds of solicitation such as collection of money for gifts (Pet. App. A56-A66) and sales of Girl Scout cookies (*id.* at A77) with either no imposition of discipline at all or, at most, an informal admonition. *Id.* at A82, A88, A100. Second, the ALJ found that petitioner's reliance on Rye's alleged violation of the rule was "a pretext to retaliate against Rye for her union activity, and to warn others lest they suffer the same fate." *Id.* at A89. Finally, the ALJ determined that the interviews conducted by petitioner's supervisors constituted unlawful interrogation, in violation of Section 8(a)(1), because the interviewees were not informed that they need not answer the questions or assured that no

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[3] In so holding, the ALJ applied the principle enunciated by the Board in *Daylin, Inc.*, 198 N.L.R.B. 281 (1972), enforced on other grounds, 496 F.2d 484 (6th Cir. 1974). Under *Daylin*, if an employee is discharged for engaging in union solicitation in violation of a no-solicitation rule which is itself invalid under Section 8(a)(1), the discharge is unlawful, under Section 8(a)(3) and (1), unless the employer establishes that the solicitation interfered with the employee's own work or the work of other employees, and that this interference, rather than the violation of the rule, was the reason for the discharge. 198 N.L.R.B. at 281.

retaliatory measures would be taken against them. Pet. App. A104.

The Board affirmed the ALJ's findings and ordered petitioner, among other things, to rescind its no-solicitation rule, to reinstate Rye immediately with backpay, and to remove from its records any reference to the discipline given to her. Pet. App. A46.[4]

3. The court of appeals modified and enforced the Board's order. The court of appeals recognized that, in *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 803 & n.10 (1945), this Court approved the Board's view, first announced in *Peyton Packing Co.*, 49 N.L.R.B. 828 (1943), that, absent special circumstances, an employer may not prohibit union solicitation by employees during non-working time, even though the employee is on company property. Pet. App. A6 & n.6. The court of appeals agreed with the Board that petitioner's no-solicitation rule was invalid under Section 8(a)(1) because it prohibited solicitation during break times in break areas (Pet. App. A9), and that petitioner had failed to demonstrate special circumstances justifying its rule (*id.* at A11). The court, however, amended the Board's order that petitioner rescind the rule, holding, instead, that petitioner could retain the rule "insofar as it allows solicitation in all break areas." *Id.* at A13. However,

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[4] One Board member noted that, since the ALJ correctly determined that petitioner violated Section 8(a)(3) and (1) by applying its no-solicitation rule in a discriminatory manner to discharge Rye, it was unnecessary to pass on the ALJ's additional finding that petitioner violated Section 8(a)(3) and (1) by disciplining her based on an invalid no-solicitation rule. Pet. App. A44 n.2.

the court required petitioner to modify the rule to allow solicitation "during any break times or in any break areas * * * when both the solicitor and solicitee are on break time, whether informal or scheduled, and are in a break area." *Id.* at A13 n.11.[5]

The court of appeals enforced in full the Board's order respecting Rye: it held that substantial evidence supported the Board's determination that petitioner violated Section 8(a)(3) and (1) by disciplining her. The court agreed with the Board that "Cooper pretextually used the alleged violations of its no-solicitation rule to discharge Rye" (Pet. App. A17), and that "the actual reason for Rye's discharge" was that she was "organizing a union." *Id.* at A21. The court of appeals also affirmed the Board's finding that petitioner selectively enforced the no-solicitation rule against union solicitation. *Id.* at A16-A17.

Lastly, applying the criteria enumerated in *Bourne* v. *NLRB*, 332 F.2d 47 (2d Cir. 1964), the court of appeals held that the interviews conducted by petitioner's supervisors did not constitute unlawful interrogation under Section 8(a)(1). Pet. App. A23, A26-A27 & n.23. Accordingly, the court deleted a provision of the Board's order requiring petitioner to cease and desist from interrogating its employees without proper safeguards against retaliation or

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[5] The court observed that the question whether a ban on solicitation during non-working hours in actual working areas is valid was not presented by this case. Pet. App. A10 n.9; see also *id.* at A2 n.2.

discrimination, and enforced the Board's order as so modified. *Id.* at A26-A27 & n.23.[6]

ARGUMENT

1. Petitioner contends (Pet. 7-12) that the court of appeals, in affirming the Board's finding that Rye's discharge violated Section 8(a)(3) and (1), adopted "*sub silentio*" the principle enunciated by the Board in *Daylin, Inc., supra.* Petitioner asks this Court to "overturn[]" *Daylin* as inconsistent with the National Labor Relations Act. Pet. 11. Petitioner seriously mischaracterizes the decision below. The Board did invoke *Daylin,* but only as an alternative ground for holding that Rye's discharge violated Section 8(a)(3) and (1). The court of appeals, however, affirmed the Board's ruling as to Mitzi Rye solely on the alternative ground that petitioner applied its no-solicitation rule in a discriminatory manner and in retaliation against Rye for her union activity. Pet. App. A16-A19. Petitioner's challenge to that holding presents only an evidentiary issue that does not warrant further review by this Court. See *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951). In any event, we show below that substantial evidence supports the Board's finding that Rye was discharged in retaliation for her union activity. We

[6] The court of appeals also deleted two other provisions of the Board's cease and desist order in light of this ruling. However, since those provisions were based on the Board's finding of certain additional, independent Section 8(a)(l) violations which petitioner had explicitly declined to challenge in the court of appeals, the court, on the Board's motion (Pet. App. A30-A32), entered an amended judgment that reinstated them. *Id.* at A28-A29.

further show that, even if it were possible to characterize the decision below as having endorsed the Board's *Daylin* rule, petitioner's challenge to the validity of *Daylin* is jurisdictionally barred.

a. Substantial evidence supports the Board's finding that petitioner discharged Rye in retaliation for her union activity. Petitioner first expressed its concern about Rye's union activity on October 23, 1987, soon after organizing at Tupelo had commenced, when Smith and Taylor summoned Rye to Smith's office. Pet. App. A80. Taylor told Rye that her name "kept coming up" in management meetings and that unidentified employees had accused her of soliciting for the Union when she was supposed to be working. No other employee had ever been confronted in this manner regarding a violation of the no-solicitation rule. *Id.* at A81. Indeed, the evidence showed that company officials had disregarded many instances of solicitation that violated its no-solicitation policy where the solicitation was unrelated to union activity.[7]

Thereafter, in June 1988, shortly after petitioner's department managers had instructed the tire-builders on the night shift to inform management if they received a Union authorization card on company time (Pet. App. A19 n.16), Rye's supervisor pressured Dean

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[7] Contrary to petitioner's assertion (Pet. 10 n.4), the Board did not find that petitioner "uniformly enforced its no-solicitation rule against all solicitation, union and non-union alike." As stated by the court of appeals, "[t]he Board found that although Cooper almost always enforced its no-solicitation rule, it did so inconsistently and was much more harsh in its punishment as to Rye." Pet. App. A16-A17 (footnote omitted).

Johnson, one of Rye's co-workers, to give petitioner a statement alleging that Rye had solicited him in violation of company rules. Company officials wrote the statement for Johnson, "turning what might have been an innocuous exchange between Rye and Johnson into a clear violation" of the rule, and Jarzen suspended her on June 27 on the basis of that statement. *Id.* at A18-A19, A84. Following the suspension, Taylor launched an intensive investigation into Rye's union activities, but the evidence showed that he had already decided to discharge her based on Johnson's statement. *Id.* at A19, A90. The investigation yielded several additional written statements implicating Rye,[8] but petitioner did not conduct even the most superficial inquiry into the truth of those statements before discharging Rye on June 29. *Id.* at A87-A90. Given these facts, the court of appeals correctly held that substantial evidence supports the Board's finding that petitioner discharged Rye to retaliate against her for her union activity.

b. Even if it were possible to construe the court of appeals' decision as an adoption of the Board's *Daylin*

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[8] In these statements, a number of Rye's co-workers alleged that she had engaged them in conversations about the Union during work time. The court of appeals noted that these conversations "were only of a few second's [*sic*] duration and there was no evidence that any conversation resulted in or had the potential for disruption." Pet. App. A20. Contrary to petitioner's suggestion (Pet. 8-9), the court's comment does not demonstrate that it adopted *sub silentio* the Board's *Daylin* rule. Rather, the court referred to these facts as further evidence that petitioner applied its no-solicitation rule to retaliate against Rye for her union activity.

rule, review is not warranted because petitioner's challenge to the validity of *Daylin* is jurisdictionally barred. Although petitioner raised that challenge in the court of appeals, petitioner never raised it before the Board.[9] Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner has shown no "extraordinary circumstances" excusing its failure to make this argument to the Board. Accordingly, the courts lack jurisdiction to consider petitioner's claim. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

2. Petitioner asserts (Pet. 12-14) that, because Rye solicited on behalf of the Union when she or the employee she solicited should have been working, she was not engaged in activity protected by Section 7 of the Act.[10] Therefore, according to petitioner, the

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[9] Before the Board, petitioner did not urge that *Daylin* be overruled; rather, it relied directly on that decision by attempting to show that it lawfully discharged Rye because her activity interfered with her work and the work of others. Petitioner also argued that its no-solicitation rule was less restrictive than the one at issue in *Daylin*. Pet. Bd. Br. 41-42 & n.47.

[10] Section 7, 29 U.S.C. 157, provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing,

Board had no authority to order petitioner to reinstate her. Petitioner's argument is without merit, for it is based on an incorrect factual premise: the ALJ found that Rye's discussions with co-workers about the Union had not occurred during working time. Pet. App. A89-A90 (finding that Rye had "not violated the [no-solicitation] rule").[11] Moreover, the Board's order reinstating Rye was proper inasmuch as substantial evidence supports its finding that petitioner discharged Rye, not for discussions while she or the solicitee were working, but in retaliation for organizing on behalf of the Union.

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and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

[11] Contrary to petitioner's assertion (Pet. 6, 11), the court of appeals did not acknowledge that Rye solicited employees when she or others should have been working. The court of appeals noted that several employees had submitted written statements alleging that Rye solicited them on work time, but observed that those employees contradicted their own statements "in varying degrees" at the hearing, and that Rye's version of events differed substantially from theirs. Pet. App. A20 n.17. The court of appeals recognized that "the ALJ is in a unique position to evaluate the credibility and the demeanor of the witnesses," and accordingly deferred to the inferences drawn by the ALJ from the evidence. *Id.* at A21.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

OCTOBER 1992

Supreme Court, U.S.
FILED
NOV 5 1992
OFFICE OF THE CLERK

(4)

CASE NO. 92-338

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

COOPER TIRE & RUBBER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL T. McMENAMIN, *Counsel of Record*
for Petitioner Cooper Tire & Rubber
Company; and
NANCY A. NOALL
Walter, Haverfield, Buescher
& Chockley
1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212

November 6, 1992

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No. 92-338

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

COOPER TIRE & RUBBER COMPANY,
Petitioner,

v.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REPLY TO NEW ISSUES PRESENTED BY RESPONDENT

INTRODUCTION

The petitioner, Cooper Tire & Rubber Company ("Cooper")[1], has requested this Court to issue a Writ of Certiorari to review and reverse a decision of the United

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[1]Pursuant to Rule 29.1 of this Court's rules, Cooper states that there is no parent or subsidiary company of Cooper to be listed in this brief.

States Court of Appeals for the Fifth Circuit, which adopted *sub silentio*, the *Daylin* doctrine of the National Labor Relations Board, *Daylin, Inc.*, 198 NLRB 281 (1972), *enf'd* other grounds, 496 F.2d 484 (6th Cir. 1973). *Daylin* holds that if an employer maintains a no-solicitation rule prohibiting solicitation on behalf of a union and the rule is overly broad, an employee who violates what would otherwise be the valid part of the rule (*i.e.* soliciting while "on the clock" at the work station), is nevertheless protected because the rule is invalid. Petitioner contends that if an employee is engaged in union solicitation when she should be working, her activity is not protected in any manner by the National Labor Relations Act.

The Board, in opposition to the petition for Writ of Certiorari, contends that (1) the *Daylin* issue is not properly before this Court because it was not argued before the Board; (2) because of the disparate enforcement of the rule, the employee in question, Mitzi Rye, was improperly discharged; and (3) Rye did not violate even the valid part of the rule.

This brief will respond to each of the three Board contentions.

ISSUES TO BE ADDRESSED

1. Respondent, National Labor Relations Board ("Board" or "NLRB"), contends that petitioner failed to challenge, before the Board, the validity of the *Daylin* doctrine, and accordingly this Court lacks jurisdiction to consider petitioner's claim. Resp. Br. in Opp., pg. 12.

2. The Board contends that ". . . [T]he evidence showed that company officials had disregarded many instances of solicitation that violated its no-solicitation policy where the solicitation was unrelated to union activity." Resp. Br. in Opp., pg. 10.

3. The Board contends that Rye's discussions with co-workers about the Union, which led to her suspension and discharge, did not occurr during working time. Resp. Br. in Opp., pg. 13.

A. Challenge to *Daylin* Doctrine

1. The issue of the invalidity of the *Daylin* doctrine is properly before this Court, because, contrary to the Board's assertion, it *was* raised before both the ALJ and the Board. In Cooper's Brief to the ALJ, at page 84, note 39, (Reply Brief App., pg. 2) petitioner stated,

> 39. Board precedent stands for the proposition that a discharge is presumptively unlawful if made pursuant to an overly broad no-solicitation rule, even when the employee has engaged in solicitation which occurs during an employee's work time. **Cooper disagrees with *Daylin, Inc.* and *J.L. Hudson* and its progeny to the extent that such cases suggest that the discharge of an employee, who violates the valid part of an overly broad no-solicitation rule is invalid.** (Emphasis added).

2. In its Exceptions to the Decision of the Administrative Law Judge, filed with the Board, Cooper, at Exception Number 107 (Reply Brief App., pg. 3), excepted to the ALJ's failure to find that "a discharge is valid if made pursuant to the valid part of an invalid no-solicitation rule." See, 29 C.F.R. §102.46(b)(2) (Reply Brief App., pg. 1)

3. Similarly, in its brief to the Board in support of its exceptions to the ALJ's Decision, Cooper, at page 39 (Reply Brief App., pg. 4), stated "Cooper was entitled to discipline Pickering and Rye for soliciting employees on work time, regardless of whether its rule is deemed to be invalid." This statement in support of Exception 107 is directly in conflict with the *Daylin* doctrine, and thus placed the issue before the Board.

The test for compliance with §10(e) of the Act, 29 U.S.C. 160(e) is whether or not the objection was such as would apprise the Board that petitioner intended to press the question now presented. *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255 (1943). Clearly, the exception to the ALJ's decision was not so ambiguous as to be totally ineffective to adequately apprise the Board of Cooper's intentions. *NLRB v. Best Products Co., Inc.*, 765 F.2d 903, 909 (9th Cir. 1985). When a recent decision of the Board was remanded by the 6th Circuit, the Board on remand stated: "The Court found that Respondent timely raised its . . . argument in its brief in support of exceptions to the ALJ's decision." *Camvac International*, 297 NLRB 853 (1990).

Based on the foregoing, the request to this Court to overturn the *Daylin* doctrine is properly before the Court.

B. Disparate Treatment of Rule Violators

1. As stated above, the Board in its Brief in Opposition contends that the evidence showed that Cooper disregarded many instances of violations of the no-solicitation rule, where the solicitation was not related to union activity. However, the ALJ, at Pet. App. A69-70, held,

> ". . . I cannot infer or **find** that the interpretation and **enforcement** of the [no-solicitation] rule shows by a preponderance of the evidence that the rule was so interpreted or enforced as to show disparate treatment toward the rights of employees under Section 7 of the Act." (Emphasis added)

2. While the ALJ, and thus the Board, stated at Pet. App. A82, "there seems to be disparate enforcement of the rule", the phrase "seems to be" cannot override the specific **finding** at Pet. App. A69 that there was no disparate enforcement. Thus, the statement of the Court of Appeals at Pet. App. A21, holding that the Board's "finding of disparate enforcement . . . [is] supported by substantial evidence" is contrary to the Board's decision.

C. Rye's Union Activity Occurred on Working Time

1. The Board contends in its brief in opposition that Rye's discussions with co-workers about the union had not occurred during working time. Resp. Br. in Opp., pg. 13. However, the ALJ, at Pet. App. A(84) found that on at least one day in question, the discussion and union card distribution took place while Rye had stopped working, was still at her machine and still on the clock. The Court of Appeals in its modified order found that:

> "Cooper need not amend its no-solicitation rule to permit solicitation in actual working areas, i.e., in the immediate areas surrounding continuously operating machines." Pet. App. A14, n. 11.

Since it is undisputed that Rye was on the clock in an actual work area when she solicited a fellow employee who was also in the same immediate area (Pet. App. A83-84), she unquestionably violated the valid part of the rule. The rule does not require that production be stopped by the violation, or even that there be substantial interference with production -- all that is required is that a solicitation take place in a prohibited area or at a prohibited time. That was proven beyond a reasonable doubt.

2. Contrary to the Board's assertion at page 9 of its Brief in Opposition, the Fifth Circuit did, in fact, apply the *Daylin* doctrine in reaching its decision below. In

looking at the length of Mitzi Rye's work-time conversations with employees about the union, and the actual or potential interference with production caused by her work-time solicitation (Pet. App. A20), the Court was applying the *Daylin* doctrine even though the Court did not acknowledge that it was doing so. The Court delved into the question of production interference because of the *Daylin* doctrine. *Daylin* provides for lawful discharge for violation of an invalid rule only if the employer can show interference with production by the solicitor or solicitee. If the rule had been valid, and if Rye had violated the rule, then production interference would not be an issue. The Court examined the work interference issue to comply with *Daylin*.

Thus, contrary to the Board's contention, the Court did apply the *Daylin* doctrine, and the issue is properly before this Court.

CONCLUSION

Scores of cases annually flood the Board and Court dockets regarding the application of no-solicitation rules. This very important issue of whether the *Daylin* doctrine (1) improperly shifts to the employer the burden of proving that it did not violate the NLRA; and (2) provides protection under the NLRA to unpro-

tected activity, should now be addressed by this Court to give guidance to both the Board and the public as to the expected level of conduct.

Respectfully submitted,

Michael T. McMenamin, *Counsel of Record*
for Petitioner, Cooper Tire &
Rubber Company;
and
Nancy A. Noall
WALTER, HAVERFIELD, BUESCHER
& CHOCKLEY
1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212
Attorneys for Petitioner

APPENDIX

STATUTES INVOLVED

29 C.F.R. §102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.

(b)(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

IN THE UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

COOPER TIRE & RUBBER COMPANY	)	CASE NOS. 26-CA-12639
	)	26-CA-12711
and	)	
	)	
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, CLC	)	

RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

. . . . .

39. Board precedent stands for the proposition that a discharge is presumptively unlawful if made pursuant to an overly broad no-solicitation rule, even when the employee has engaged in solicitation which occurs during an employee's work time. **Cooper disagrees with *Daylin, Inc.* and *J.L. Hudson* and its progeny to the extent that such cases suggest that the discharge of an employee, who violates the valid part of an overly**

broad no-solicitation rule is invalid. (Emphasis added).

IN THE UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

COOPER TIRE &	)	
RUBBER COMPANY	)	CASE NOS. 26-CA-12639
	)	26-CA-12711
and	)	
	)	
UNITED RUBBER,	)	
CORK, LINOLEUM	)	
AND PLASTIC WORKERS	)	
OF AMERICA,	)	
AFL-CIO, CLC	)	

RESPONDENT'S EXCEPTIONS TO
THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE

. . . . .

107. The ALJ's failure to find that a discharge is valid if made pursuant to the valid part of an invalid no-solicitation rule.

. . . . .

IN THE UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

COOPER TIRE & RUBBER COMPANY	)	CASE NOS. 26-CA-12639
	)	26-CA-12711
and	)	
	)	
UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, CLC	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

. . . . .

2. Cooper Lawfully Suspended Rocky Pickering And Discharged Mitzi Rye Because Their Solicitations During Work Time Impaired Productivity

Cooper was entitled to discipline Pickering and Rye for soliciting employees on work time, regardless of whether its rule is deemed to be invalid.

. . . . .